TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 489

THE BALTIMORE & OHIO RAILROAD COMPANY, CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY, CHICAGO & ERIE RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS

FILED AUGUST 7, 1923

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[fol. 1] Caption omitted in printing

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[fol. 4] IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ILLINOIS

In Equity. No. 3427

THE BALTIMORE & OHIO RAILROAD COMPANY, CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY, CHICAGO & ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY, AND WABASH RAILWAY COMPANY, Plaintiffs,

vs.

UNITED STATES OF AMERICA, THE NEW YORK CENTRAL RAILROAD COMPANY, CHICAGO RIVER AND INDIANA RAILROAD COMPANY, THE CHICAGO JUNCTION RAILWAY COMPANY, THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, AND RICHARD FITZGERALD, Defendants.

BILL OF COMPLAINT—Filed April 10, 1923

To the Honorable Judges of the District Court of the United States for the Eastern Division of the Northern District of Illinois, in Chancery sitting:

The Baltimore & Ohio Railroad Company, a corporation organized and existing under the laws of the State of Maryland, with its principal operating office at Baltimore, Maryland, and a citizen of the State of Maryland; the Chicago, Indianapolis & Louisville Rail- [fol. 4a] way Company, a corporation organized and existing under the laws of the State of Indiana, with its principal operating office at Chicago, Illinois, and a citizen of the State of Indiana; the Chicago & Erie Railroad Company, a corporation organized and existing under the laws of the State of Indiana, with its principal operating office at Chicago, Illinois, and a citizen of the State of Indiana; the Grand Trunk Western Railway Company, a corporation organized and existing under the laws of the State of Michigan and Indiana, with its principal operating office at Detroit, Michigan, and a citizen of the State of Michigan; The Pennsylvania Railroad Company, a corporation organized and existing under the laws of the State of Pennsylvania, with its principal operating office at Philadelphia,

Pennsylvania, and a citizen of the State of Pennsylvania; The Pittsburgh, Cincinati, Chicago & St. Louis Railroad Company, a consolidated corporation organized and existing under the laws of the States of Pennsylvania, West Virginia, Ohio, Indiana and Illinois, with one of its principal operating office at Chicago, Illinois, and a citizen of the said states; and the Wabash Railway Company, a corporation organized and existing under the laws of the State of Indiana, with its principal operating office at St. Louis, Missouri, and a citizen of the State of Indiana; present this their bill of complaint against the United States of America; The New York Central Railroad Company; Chicago River and Indiana Railroad Company; The Chicago Junction Railway Company; The Chicago Junction Railways and Union Stock Yards Company, and Richard Fitzgerald, and thereupon plaintiffs respectfully say:

[fol. 4-b] I. Plaintiffs above named are corporations, citizens of the states of their incorporation, owning and operating their separate lines of railroad between Chicago, in the State of Illinois, and points in other states of the United States, and as such are engaged in the interstate transportation of persons and property subject to the provisions of the Interstate Commerce Act.

II. The New York Central Railroad Company, hereinafter referred to as the Central, is a consolidated corporation organized and existing under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois, owning and operating as a common carrier engaged in interstate commerce subject to the provisions of the Interstate Commerce Act, certain main lines of railroad, with various branches connecting therewith, that extend from New York in the State of New York, to Chicago, in the State of Illinois, and is a resident of the Northern District of Illinois.

The Chicago River and Indiana Railroad Company, hereinafter referred to as the River Road, is a corporation organized and existing under the laws of the State of Illinois, owning and operating as a common carrier engaged in interstate commerce subject to the provisions of the Interstate Commerce Act, certain lines of railroad with various branches, spurs, extensions, yards, and other appurtenances located wholly within the City of Chicago in the State of Illinois, in and adjacent to the so-called Stock Yards District in said city, and is a resident of the Northern District of Illinois.

The Chicago Junction Railway Company, hereinafter referred [fol. 4-c] to as the Junction, is a corporation organized and existing under the laws of the State of Illinois, owning and operating as a common carrier engaged in interstate commerce subject to the provisions of the Interstate Commerce Act, certain lines of railroad with various branches, spurs, extensions, yards and other appurtenances located wholly within the city of Chicago in the State of Illinois, in and adjacent to the so-called Stock Yards District in said city and is a resident of the Northern District of Illinois.

The Chicago Junction Railways and Union Stock Yards Company is a corporation organized and existing under the laws of the State

of New Jersey, and is a citizen of the State of New Jersey; on May 16, 1922, it owned all of the capital stock of the Junction and fifty (50) per cent of the capital stock of the River Road.

Richard Fitzgerald is a citizen and a resident of the State of Illinois, and of the Northern District of Illinois, and on May 16, 1922, owned fifty (50) per cent of the capital stock of the River Road.

III. This is a suit brought pursuant to the provisions of C.32 of the Urgent Deficiency Appropriations Act, approved Oct. 22, 1913, (38 Stat. L., 219, 220) to enjoin, set aside, annul, suspend and restrain the enforcement, operation and execution of an order of the Interstate Commerce Commission entered May 16, 1922, in Finance Docket 1165, and to enjoin and restrain the Central, the River Road, the Junction, the Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald from the sale and purchase of certain stock and the execution of a certain lease authorized and approved by the Interstate Commerce Commission in said order, as [fol. 5] will more fully appear below, said order having been made and entered on the petition of the said Central, and to set aside and hold for naught any and all acts, transactions, matters and things performed and done by any of said defendants under or in alleged conformity with said order of May 16, 1922.

IV. The Central on December 28, 1920, filed its application with the Interstate Commerce Commission, hereinafter referred to as the Commission, for authority and for a certificate of public convenience and necessity, pursuant to the provisions of the Interstate Commerce Act, in respect of the following transactions and in the words and figures following:

"(1) To enter into an agreement with The Chicago Junction Railways and Union Stock Yards Company providing:

(a) That The New York Central Railroad Company shall purchase for the sum of $750,000, to be paid in cash or in such securities as the Vendor and Vendee shall agree upon, all of the capital stock of The Chicago River and Indiana Railroad Company;

(b) That The Chicago Junction Railway Company shall lease at an annual rental of $2,000,000, payable in quarterly installments of $500,000 each at the expiration of each quarter year during the term, except that the first two installments shall be for the sum of $250,000 each, for a term of Ninety-nine (99) years, and thereafter at the election of the Lessee in perpetuity, to The Chicago River and Indiana Railroad Company all of its properties of every kind and character, including those held by it in lease under a certain indenture dated December 1, 1913, made between The Union Stock Yard and Transit Company of Chicago, as lessor, and said The Chicago Junction Railway Company, as lessee, and supplements thereto.

[fol. 6] (c) That The New York Central Railroad Company be granted an option, to be exercised during the term of said lease, to

purchase either from The Chicago Junction Railways and Union Stock Yards Company, a New Jersey corporation, all of the capital stock of said The Chicago Junction Railway Company for the sum of $22,987,516, to be paid in cash or in such securities as the Vendor and Vendee shall agree upon, or to purchase from the respective owners thereof all of the properties of every kind and character and the reversionary interests therein of respectively The Chicago Junction Railway Company and The Union Stock Yard and Transit Company of Chicago, to be leased pursuant to the agreement for which approval is herein sought, by The Chicago Junction Railway Company to The Chicago River and Indiana Railroad Company, for the sum of $33,333,333, payable in cash or in such securities as the Vendor and the Vendee shall agree upon, of which purchase price $22,987,516 is to be paid to The Chicago Junction Railway Company and $10,345,817 to The Union Stock Yard and Transit Company of Chicago.

(2) To each of the corporations above named, including your petitioner, to execute all assignments, transfers, leases, deeds and other instruments and agreements necessary to make the transfers, leases and conveyances in said agreement provided for."

V. In its said application the Central stated that said application was filed pursuant to the provisions of paragraphs (18) to (20), inclusive, of Section 1, and paragraph (2) of Section 5, of the Interstate Commerce Act.

Said paragraphs (18) to (20), inclusive, of Section 1 of the Interstate Commerce Act, provide as follows:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall [fol. 7] engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each state in which such additional or extended line of railroad is

proposed to be constructed or operated or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with [fol. 8] the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Paragraph (2) of Section 5 of the Interstate Commerce Act provides as follows:

"(2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition under such rules and regulations and for consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

VI. No application has been filed with the Interstate Commerce Commission either by the River Road, the Junction of The Chicago Junction Railways and Union Stock Yards Company for authority and/or for a certificate of public convenience and necessity in respect of the matters or things referred to in paragraph IV hereof.

[fol. 9] VII. The said application of the Central referred to in paragraph IV above, was received by the Commission and docketed as "Finance Docket 1165." At the first hearing in said proceeding, held by the Commission at Chicago, Illinois, on April 5, 1921, plaintiffs appeared and filed an intervening petition in opposition to the prayer of the application; said intervening petition was received by the Commission and your plaintiffs were made parties to the said proceeding. Thereafter extensive public hearings were held at Chicago, Illinois, and Washington, D. C.

VIII. On May 16, 1922, the Commission (four commissioners dissenting) handed down its decision, report and order in said Finance Docket 1165, finding that subject to the observance of 17 specified conditions the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction, would be in the public interest. The Commission specifically ordered:

"That the acquisition by the New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock at a price not exceeding the sum of $750,000, be, and the same is hereby, approved and authorized."

The Commission further ordered:

"That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized."

[fol. 10] Said decision, report and order is attached hereto, marked "Exhibit 1," and is made a part hereof, as fully as if set forth at this point.

IX. Thereafter, on May 29, 1922, your plaintiffs filed with the Commission a petition praying for modification of said report and order, and for a reversal of the finding and order of approval as made; a copy of said petition is attached hereto, marked "Exhibit 2," and is made a part hereof as fully as though set forth herein.

The said petition for modification of report and order was denied by the Commission by order entered June 12, 1922.

X. The said order of the Interstate Commerce Commission, dated May 16, 1922, is unlawful and void in the following respects:

1. The Commission was without authority either in law or in fact to make the said order.

2. The said order contains no certificate from the Commission that the present or future public convenience and necessity requires or will require the operation by the Central of the railroad properties owned and/or operated by the River Road and/or the Junction on May 16, 1922.

3. The said order contains no certificate from the Commission that the present or future public convenience and necessity requires or

will require the operation by the River Road of the railroad properties owned and/or operated by the Junction on May 16, 1922.

4. The record made before the Commission upon which the said [fol. 11] order is based contains no evidence that the present or future public convenience and necessity requires or will require the extension of the Central's line of railroad by acquiring the Junction Roads and/or requires or will require the operation by the Central of the railroad properties owned and/or operated by the River Road and/or the Junction on May 16, 1922; but, on the contrary, the said record contains evidence which clearly shows that the extension of the Central's line of railroad by acquiring the Junction Roads and that the operation by the Central of the railroad properties owned and/or operated by the River Road and/or by the Junction on May 16, 1922, is and will be contrary to the present or future public convenience and necessity.

5. The record made before the Commission upon which the said order is based contains no evidence that the present or future public convenience and necessity requires or will require an extension of the River Road's line of railroad by acquiring the Junction properties and/or requires or will require the operation by the River Road of the railroad properties owned and/or operated by the Junction on May 16, 1922; but, on the contrary, the record contains evidence which clearly shows that the extension of the River Road's line of railroad by acquiring the Junction properties and that the operation by the River Road of the railroad properties owned and/or operated by the Junction on May 16, 1922, is and will be contrary to the present or future public convenience and necessity.

6. The record made before the Commission upon which the said order is based contains no evidence that the acquisition by the Central of control of the River Road by the purchase of the capital stock of the River Road will be in the public interest; but, on the contrary, the said record contains evidence which clearly shows that the said acquisition of control is and will be directly contrary to public interest and to a sound public policy.

[fol. 12] 7. The record made before the Commission upon which the said order is based contains no evidence that the acquisition by the River Road of the control of the properties of the Junction under a lease will be in the public interest; but, on the contrary, the said record contains evidence which clearly shows that the said acquisition is and will be directly contrary to the public interest and to a sound public policy.

8. The Commission, by paragraph (2) of Section 5 of the Interstate Commerce Act, is authorized to approve the acquisition by one of such carriers of control of another carrier, either under a lease or by the purchase of stock, only when such control does not involve the consolidation of such carriers into a single system for ownership and operation, and when such control will be in the public interest; acquisition by the Central of the control of the River Road by the purchase of the capital stock of said River Road and acquisition

by the River Road of control of the Junction by lease of its properties, as set forth in the application of the Central to the Commission and authorized by the Commission, will constitute a consolidation of the Central, the River Road and the Junction into a single system for ownership and operation, and, therefore, the Commission is without authority by order to approve and authorize such acquisition.

9. Under paragraph (6) of Section 5 of the Interstate Commerce Act it is lawful for two or more carriers by railroad subject to said act, to consolidate their properties, or any part thereof, into one corporation for the ownership, management and operation of properties theretofore in separate ownership, management and operation, under certain conditions the first of which is that the proposed consolidation must be in harmony with an in furtherance of, the plan of consolidation mentioned in paragraph (5) of said Section 5, and must [fol. 13] be approved by the Commission. The acquisition by the River Road of the Junction properties under a lease for ninety-nine (99) years, renewable in perpetuity at the option of the lessee, constitutes a consolidation of the properties of the River Road and of the Junction into one corporation, viz: the Chicago River & Indiana Railroad Company, for ownership, management, and operation of properties theretofore in separate ownership, management and operation. The Interstate Commerce Commission has not prepared and adopted any plan for the consolidation of the railway properties of the continental United States into a limited number of systems, as required by paragraphs (4) and (5) of Section 5 of the Interstate Commerce Act. The Commission has agreed upon a tentative plan for the consolidation of certain railway properties of the continental United States into a limited number of systems, and has given the same due publicity, but has not adopted a plan for such consolidation and published the same in accordance with paragraph (5) of said Section 5. In said tentative plan, which has been published, the Commission excepted the properties of the Indiana Harbor Belt Railroad Company from the list of properties which shall constitute the New York Central System, but made no disposition of the terminal properties in the Chicago district. The proposed consolidation of the properties of the River Road and of the Junction, as approved and authorized by the Commission, cannot lawfully be made into one corporation for ownership, management and operation of properties theretofore in separate ownership, management and operation, because the proposed consolidation is not in harmony with, and in furtherance of, the complete plan of consolidation mentioned in paragraph (5) of Section 5 of the Interstate Commerce Act.

10. The Commission was without authority to approve acquisition by the Central of control of the River Road and the acquisition by [fol. 14] the River Road of control of the Junction, as set forth in the application of the Central to the Commission for authority to acquire the River Road and the Junction; the said application and the evidence in support thereof shows that the Central proposed to acquire said properties for the purpose of providing for common

ownership, management and operation of the River Road and the Junction as a part of the New York Central System, which System includes, among other lines of railroad, the Michigan Central Railroad, New York Central Railroad, Cleveland, Cincinnati, Chicago & St. Louis Railway, and Indiana Harbor Belt Railroad. Under the application, and the operation of said properties as set forth in the application and in the evidence, approval of the acquisition of control as specifically defined by the applicant, involved the consolidation of all carriers named in this paragraph into a single system for ownership and operation. The Commission was without authority by order to approve and authorize such acquisition.

11. The said order was entered pursuant to the application of the Central alone, and, insofar as it purports to approve and to authorize the acquisition by the River Road of the control of the property of the Junction under a lease, said order is unlawful and void in that no application has been made to the Commission by either the River Road or the Junction seeking the approval and authorization of such acquisition.

12. The order of the Commission of May 16, 1922, approving the acquisition as described therein, was made with the specific finding "Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road, and the leasing to the River Road of the properties (owned and leased) of the Junction, will be in the public interest." The finding of the [fol. 15] Commission does not comply with the provisions of paragraph (2) of Section 5 of the Interstate Commerce Act, which require the Commission to be of opinion that the acquisition of control approved by the Commission "will be in the public interest."

13. By paragraph (2) of Section 15 of the Interstate Commerce Act, except as otherwise provided therein "all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, etc." The order of May 16, 1922, did not prescribe the day upon which the same should take effect; for that reason the said order is null, void and of no effect.

14. The said order was entered pursuant to the application of the Central alone, and, in so far as it purports to approve and to authorize the leasing of the properties (owned and leased) of the Junction to the River Road, it is unlawful and void in that no application has been made to the Commission by either the River Road or the Junction for a certificate that the present or future public convenience and necessity require, or will require, the acquisition and operation by the River Road of the properties operated by the Junction on May 16, 1922.

15. The said order, in so far as it purports to approve and to authorize the leasing of the properties (owned and leased) of the Junction to the River Road is unlawful and void in that no lease of the railroad properties (owned and leased) of the Junction to the River

Road executed by the parties thereto has been submitted to, or been approved by, the Commission.

[fol. 16] XI. Plaintiffs are informed and believe the fact to be, and thereupon allege upon information and belief, that immediately upon the publication of the decision, report and order of the Commission complained of herein, and prior to July 13, 1922, the Central acquired control of the River Road by purchase of the capital stock thereof, the River Road acquired control of the Junction properties (owned and leased) by lease for the period of 99 years renewable at the option of the lessee in perpetuity, and the said Central and River Road have continually operated the said railroad properties as an integral part of, and for the benefit of, the New York Central System of railroads.

Said acquisition of control of the River Road and of the Junction and the operation thereof, was, is and will be in violation of the Interstate Commerce Act.

XII. Plaintiffs further show that the River Road and the Junction on May 16, 1922, were and always have been, neutral belt railroads, uncontrolled by any trunk line carrier, and as such were used by all railroads entering Chicago, impartially and without discrimination; that the acquisition of control approved and authorized by the Commission in its order of May 16, 1922, will substitute monopoly of control and operation for the neutral control and operation of the Junction Railroads which prior to May 16, 1922, served alike the public, the shippers located thereon, and all railroads reaching Chicago; that the acquisition of control approved and authorized by the Commission in its said order will of necessity greatly curtail, if not [fol. 17] ultimately destroy, the independence of shippers located upon the lines of the Junction and the River Road in the choice of routes and sources of car supply since preference will naturally be given to the placement of cars of the Central to the exclusion of those of your plaintiffs, its competitors; practically all of the tonnage originating at, or destined to, points on the Junction and River Roads is competitive tonnage in that the same could be hauled over the lines of railroad constituent parts of the New York Central System, or over the lines of one or more of your plaintiffs. One of the prime purposes of the Central in acquiring control of the Junction and the River Road was to secure the line haul and the revenue resulting therefrom on such competitive tonnage; that the acquisition of control approved and authorized by the said Commission in its said order will result in diverting a large portion of said competitive tonnage from the rails of your plaintiffs to the rails of the Central, or other routes in the New York Central System; that such diversion, with consequent loss of revenue to plaintiffs, will constitute irreparable loss and injury; that the loss in net earnings to plaintiffs which will result from the acquisition of control approved and authorized by the Commission in its order will exceed $10,000,000 per annum.

In consideration whereof, forasmuch as your plaintiffs are remediless in the premises at law, and relievable only in a court of equity, plaintiffs pray that a preliminary or interlocutory order or injunction

be entered restraining and suspending the enforcement, operation and execution of the said order of the Commission until final determination of this cause, and that upon the final hearing herein a decree be entered perpetually enjoining, suspending, annulling and setting aside the enforcement, operation and execution of said order.

And plaintiffs further pray that forasmuch as they are without [fol. 18] full and complete knowledge of the extent to which the Central, the River Road, the Junction, the Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald, defendants therein, have acted under the order of the Commission of May 16, 1922, and are without full knowledge of the extent to which the said defendants have executed the assignments, transfers, leases, deeds and other instruments and agreements for which the approval and authorization of the Commission were sought by the Central in its application in said Finance Docket 1165, your plaintiffs pray that the said Central, the River Road, the Junction, the Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald, parties defendant to this bill, may be required to make full, true, direct and perfect answers (but not under oath, answer under oath being expressly waived), to all and singular the matters aforesaid, and more especially that they may answer and set forth:

1. Whether the Central has purchased and now owns all of the capital stock of the River Road.

2. Whether the Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald have sold to the Central all of the capital stock of the River Road owned by them on May 16, 1922.

3. Whether the Central has acquired the control of the River Road by the purchase of its capital stock, and, having acquired such control, whether the Central now directs the operation of the said River Road as a part of the New York Central System.

4. Whether the Junction has executed a lease of its railroad properties to the River Road.

5. Whether the River Road has entered into a lease with the Junction whereby it has acquired control under said lease of the properties of the Junction.

[fol. 19] 6. Whether the Central through its ownership of the entire capital stock of the River Road now controls the Junction properties and directs the operation of the same as part of the New York Central System.

7. What change in officers and/or directors, if any, has been made by the River Road since May 16, 1922.

8. What change in tariffs or schedules, under Section 6 of the Interstate Commerce Act, has been made by the River Road or the Junction since May 16, 1922.

9. What powers of attorney or authorizations by the River Road or its officers to any other common carrier, officer or agent to file tariff

of rates, fares, or charges, or rules and regulations affecting compensation for transportation of property, have been made or executed since May 16, 1922.

10. The names of any and all officers and directors of the River Road who are officers and directors of any carriers, specifying the same, commonly known as New York Central Lines.

11. What authorizations, if any, have been issued by the Interstate Commerce Commission to officers and directors of the New York Central Lines to be officers and directors of the River Road, in accordance with paragraph (12) of Section 20-A of the Interstate Commerce Act.

And plaintiffs further pray that a preliminary or interlocutory order or injunction be entered

1. Setting aside the sale of the capital stock of the River Road by the Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald to the Central; and

2. Restraining the Central, its officers, attorneys, agents, employes and servants

[fol. 20] (a) from controlling and directing, or attempting to control and direct, by any method or means whatsoever, the operation of the River Road;

(b) from voting the said capital stock of the River Road at any special or general meeting of the stockholders of said corporation; and

(c) from exercising any rights as a stockholder of the River Road; and

3. Setting aside and declaring null and void any election or elections of officers or directors of the River Road subsequent to the purchase of the capital stock of said corporation by the Central; and

4. Restraining any officer or officers of the River Road elected by the votes of the capital stock of the said corporation owned by the Central

(a) from controlling or attempting to control the operation of the said River Road; and

(b) from exercising or attempting to exercise any of the rights or privileges of an officer or director of the said River Road; and

5. Directing that the officers and directors of the River Road in office immediately prior to the acquisition by the Central of the capital stock of the River Road be restored to their respective offices, rights and privileges, until the final determination of this cause; and

6. Setting aside and declaring null and void and of no effect whatsoever the lease by the Junction of its properties to the River Road; and

7. Restraining the River Road, its officers, attorneys, agents, employes and servants

(a) from controlling and directing, or attempting to control and direct, by any method or means whatsoever, the operation of the Junction Road;

(b) from exercising, or attempting to exercise, any rights or privileges as a lessee of said property;

[fol. 21] 8. Directing that the control of the railroad property of the Junction be restored to the Chicago Junction Railway Company until the final determination of this cause; and that upon final hearing herein a decree be entered.

9. Setting aside and declaring null and void and of no effect whatsoever the said sale of the capital stock of the River Road by the Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald to the Central; and

10. Perpetually enjoining and restraining the Central, its officers, attorneys, employes and servants

(a) from controlling and directing, or attempting to control and direct, by any method or means whatsoever, the operation of the River Road;

(b) from voting the said capital stock of the River Road at any special or general meeting of the stockholders of said corporation; and

(c) from exercising any rights as a stockholder of the River Road; and

11. Setting aside and declaring null and void any election or elections of officers or directors of the River Road subsequent to the purchase of the capital stock of said corporation by the Central; and

12. Restraining any officer, or officers, of the River Road, elected by the votes of the capital stock of the said corporation owned by the Central

(a) from controlling, or attempting to control, the operation of the River Road; and

(b) from exercising, or attempting to exercise, any of the rights or privileges of an officer or director of the River Road; and

13. Directing that the officers and directors of the River Road in office immediately prior to the acquisition by the Central of the capital stock of the River Road be restored to their respective offices, rights and privileges; and

[fol. 22] 14. Setting aside, and declaring null and void and of no effect whatsoever, the lease by the Junction of its properties to the River Road; and

15. Restraining the River Road, its officers, attorneys, agents, employes and servants

(a) from controlling and directing, or attempting to control and direct, by any method or means whatsoever, the operation of the Junction Road;

(b) from exercising, or attempting to exercise, any rights or privileges as a lessee of said property; and

16. Directing that the control of the railroad properties of the Junction be restored to the Chicago Junction Railway Company.

And your plaintiffs further pray, inasmuch as the purpose of the foregoing prayers for relief is to set aside the order of the Commission of May 16, 1922, and to restore the status quo of May 15, 1922, for such other and further orders or decrees as may be necessary to set aside said order of the Commission and to require the defendants and each of them to vacate, annul and set aside any and all action which may have been taken under and by reason of said order of the Commission and to take such action as may be necessary to restore the parties and properties affected by said order, to the status of May 15, 1922; and for such further and other relief in the premises as the nature of the case shall require and to this court shall seem meet.

And your plaintiffs further pray, that Your Honors will direct proper writs of subpœna be issued and that a copy of this bill of complaint be forthwith served upon each and every of the defendants herein named in the manner provided in the Acts of Congress, and your plaintiffs will ever pray.

Luther M. Walter, John S. Burchmore, Nuel D. Belnap, Solicitors for Plaintiffs.

[fol. 23] STATE OF ILLINOIS,
County of Cook, ss:

Franklin G. Robbins of Chicago, Ill., on oath states that he is the Vice-President of the Chicago and Erie R. R. Co. *Railroad Company*, one of the plaintiffs in the above entitled cause; that he has read the above bill of complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated to be true on information and belief, and as to those matters he believes them to be true.

Franklin G. Robbins.

Subscribed and sworn to before me this 10th day of April, 1923. James McCollum, Notary Public. (Seal.)

[fol. 24] EXHIBIT 1 TO BILL OF COMPLAINT

Interstate Commerce Commission

Finance Docket No. 1165

In re Application of the NEW YORK CENTRAL RAILROAD COMPANY for Authority and for a Certificate of Public Convenience Evidencing the Commission's Approval in Respect of the Following:

(a) The purchase by the New York Central Railroad Company of all of the Capital Stock of the Chicago River & Indiana Railroad Company;

(b) The leasing by the Chicago Junction Railway Company for a term of 99 years and thereafter at the election of the lessee in perpetuity of all its properties (owned and leased) to the Chicago River & Indiana Railroad Company;

(c) The granting to the New York Central Railroad Company of an option to purchase all of the Capital Stock of the Chicago Junction Railway Company or all of the properties to be leased by it to the Chicago River & Indiana Railroad Company; all pursuant to the provisions of paragraphs (18) to (20), inclusive, of Section 1 and of Paragraph (2) of Section 5 of the Interstate Commerce Act.

Submitted April 5, 1922. Decided May 16, 1922

1. Acquisition by the New York Central Railroad Company of control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock, approved and authorized subject to certain conditions.

[fol. 25] 2. Acquisition by the Chicago River & Indiana Railroad Company of control of the Chicago Junction Railway, by lease, approved and authorized subject to certain conditions.

3. Application of the New York Central Railroad Company for authority to purchase the capital stock of the Chicago Junction Railway Company or its physical properties, denied without prejudice to future proceedings.

Robert J. Cary and Sidney C. Murray, for applicant.
Silas H. Strawn and Frederick C. Hack, for Chicago Junction Railway Company and Chicago River & Indiana Railroad Company.
Luther M. Walter, for intervening carriers.
Irving Herriott, for certain interveners.
Butler, Lamb, Foster & Pope and E. S. Ballard, for certain interveners.
C. G. Austin, Jr., for Belt Railway Company.
Walter L. Fisher, for Chicago Railway Terminal Commission.

By the COMMISSION:

The New York Central Railroad Company, hereinafter termed the Central, a carrier by railroad subject to the Interstate Commerce Act, on December 28, 1920, filed its application for approval of the following proposed transactions:

(a) The purchase by the Central of all of the capital stock of the Chicago River & Indiana Railroad Company, hereinafter termed the River Road;

(b) The leasing to the River Road of the properties (owned and [fol. 26] leased) of the Chicago Junction Railway Company, hereinafter termed the Junction, for a term of 99 years and thereafter, at the option of the lessee, in perpetuity;

(c) The granting to the Central by the Junction of an option to purchase all of the capital stock of the latter or all of the properties to be leased as last above set forth.

Said application recites that it is filed pursuant to the provisions of paragraphs (18) to (22), inclusive, Section 1, and of paragraph (2), Section 5, of the Interstate Commerce Act. No representations were made by any State authority for or against the granting of the application. Public hearings were held at Chicago and at Washington and all interested parties were given opportunity to be heard. At the opening of the hearing, interventions in opposition to the application were filed by the following trunk lines entering Chicago from the east and southeast: Baltimore & Ohio Railroad Company; Chesapeake & Ohio Railway Company; Chicago, Indianapolis & Louisville Railway Company; Chicago & Erie Railroad Company; Grand Trunk Western Railway Company; Pennsylvania Railroad Company; Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, and Wabash Railway Company. Two groups of shippers also intervened, one in opposition to the application and the other taking a neutral position. In addition there were filed separate written endorsements of individual corporations and firms, comprising about 90 per cent of the 400 shippers served by the Junction and the River Road, urging our approval of the proposed plan. About 30 of these endorsements were subsequently withdrawn. The Chicago Railway Terminal Commission was also represented during a portion of the hearings.

The record, which is voluminous, established the following facts: [fol. 27] The territory served by the Junction and River Road lines is entirely within the so-called Chicago switching district, and is treated in the application as dividing naturally into five groups, of which two are of primary importance for the purposes of this proceeding, namely, the Central Manufacturing District and the Stock Yards group. The other three comprise the sections north from the stockyards to 15th street, east to Lake Michigan and southwest to Central Park avenue, respectively, including what is known as the

Kenwood Manufacturing District. The Central now controls by stock ownership the Indiana Harbor Belt Railroad, hereinafter termed the Harbor Belt, which is located for the most part outside of Chicago and connects the Central main line with the River Road at Elsdon and with that road and the Junction at 49th and Oakley streets, and again with the latter line at 49th and Morgan streets. The other eastern trunk lines, intervening in this proceeding and competing with the Central for line-haul traffic, connect with the terminal facilities afforded by the Junction and River Road either directly from their own rails or by means of other belt lines, namely, the Belt Railway of Chicago, controlled by a group of carriers, the Chicago & Western Indiana Railroad, likewise so controlled, and the Baltimore & Ohio Chicago Terminal Railway, owned by the Baltimore & Ohio Railroad. The Junction and River Road properties, the Elgin, Joliet & Eastern Railroad and the Illinois & Northern Railroad comprise the only independently owned terminals in the Chicago switching district. The Junction and River Road handle traffic to and from all of the twenty-three trunk lines entering Chicago.

The nucleus of the present Junction system was constructed in 1865 by the stockyards interests, which operated the property up to 1887, all of the trunk lines entering the yards for both inbound and outbound traffic. From 1887 to 1893 the lines were operated by a transfer association controlled by the carriers. The stockyards com-
[Vol. 28] pany resumed operation from 1893 to 1897, in which year the properties were leased to the Chicago & Indiana State Line Company for 50 years, and in 1898 the lines were merged with the Chicago, Hammond & Western Company under the corporate name of Chicago Junction Railway Company. In 1907 the Junction sold the Chicago, Hammond & Western properties to the Harbor Belt.

Besides serving the stockyards and Packingtown, the Junction performs terminal service for all the carriers in reaching the Central Manufacturing District, which as an institution has been in existence for about 15 years, and has 180 industries, producing a tonnage of over 100,000 carloads per year, and 100,000 tons per year of l. c. l. freight. This district is in the geographical center of the city and is capable of accommodating not less than 500 additional industries and of producing more than twice the present annual tonnage of freight.

The movement of livestock in and out of the Junction yards is essentially different from the method of handling the dead freight, in that each carrier moves its trains to the unloading chutes with its own power, and goes into the pens for outbound stock destined for its own line. All parties concede that that is the only practical method of handling that traffic. In the case of dead carload freight inbound, the line-haul carrier places its loads in the Junction yards at Ashland avenue, where they are picked up by Junction engines and crews and moved to the point of unloading. Outbound carloads are picked up by the Junction crews at team and industry tracks and moved to its 49th street classification yards, then taken out and clas-

sified for destination by the line-haul carriers, each of which has in such yards an appropriate number of tracks designated to receive its traffic. For outbound l. c. l. shipments the Junction maintains a union freight station at 15th street and Western avenue, where any [fol. 29] number of packages can be drayed by a shipper and billed to destination on as many different trunk lines to any point in the United States or Canada. Such shipments are collected by the Junction in a car or cars for each carrier and delivered to the proper track in the classification yards as in the case of carload freight. A trap car service is also maintained. Dressed meats from Packingtown are handled through the yards in like manner, each packer looking after the cleaning and icing of its own empty cars at a convenient point on the Junction rails. The Junction performs no function as to routing of a shipment, either carload or l. c. l., and if through inadvertence a shipment is offered without routing it is held for instructions. Each carrier makes regular scheduled trips to the classification yards to leave and pick up its own line-haul freight, the number of trips per day depending upon the volume of business handled by the individual carrier. Thus the Junction organization performs purely a switching service as to those movements, the charges therefor constituting a part of the through rates published by the line-haul carriers. The Junction lines also serve an important purpose in providing facilities on a trackage basis for the interchange of traffic passing through the Chicago gateway. However, with the growth of the industrial switching business, the increased density of traffic has produced such a congestion as to make it desirable to perform certain services at points farther out on the belt lines. Earnings of the Junction in the past have not been such as to permit of the expansion of its facilities to meet the growing requirements of the district served, and this is true as to interchange as well as switching and team track facilities.

The position of the Central and the grounds upon which it relies for the support of its application may be summarized as follows: [fol. 30] The Central lines are vitally in need of additional down town terminals in Chicago, which it cannot now build up for itself because of the pre-emption of real estate and the high level of land values, rendering the cost of new construction prohibitive. A terminal property must necessarily be constructed before, and not after, an industrial development takes place. The Junction and River Road properties have a strategic location which cannot now be duplicated, and could not be reproduced at any price. To bring under a common control these properties and the Harbor Belt would greatly promote the public interest by providing the necessary "balance" between the inner industrial movement afforded by the former and the transfer, interchange and classification facilities available and potential on the rails of the latter. The Junction properties are incapable of expansion so as to afford adequate facilities for interchange and classification, since the district in which they lie is highly developed and intensively used, whereas the Harbor Belt has or can acquire additional space for the building of

yards. The inner and outer properties are therefore complementary and in no sense competitive, but can only be operated to the best advantage by bringing them under common control. This expansion at outlying points would permit the inner group to extend further its team track facilities and enable a more expeditious use of the less carload facilities of the stockyards group. The gain to shippers on the Junction would be found in the greater accessibility of the outer belt facilities of the Harbor Belt and the expansion of inner facilities made possible by the removal of outer belt facilities from the inner district. Inbound traffic, for example, would be brought first to outer classification yards on the Harbor Belt and there made up into trains for the twelve districts served by the inner lines. Other services now performed by the Junction in the congested area would be performed on the outer belt, to the [fol. 31] great relief of the present Junction facilities.

The intervening carriers contend, in effect, and offer proofs tending to show, that the plan is contrary to public interest because the Junction and River Road lines are now neutral and open to all carriers and shippers on equal terms; that the plan would substitute monopoly of these facilities for the present neutrality of operation, to preserve which the Transportation Act, 1920, was designed, as evidenced by paragraph (4), section 3 of the Interstate Commerce Act, as amended; that the livestock market requires open operation of the facilities serving the stockyards, and the shippers in the district must have competitive service by neutral terminals; that the car supply for the district cannot and will not be handled fairly by the Junction if controlled by the Central; that the latter will be able by means of such control to divert a large volume of competitive line-haul traffic to its own rails, thereby causing the intervening carriers to lose earnings to such an extent as to necessitate advanced rates, and that such carriers have an equity in the properties by reason of having contributed to the Junction's earnings. They offer to combine with the Central in a joint control of the properties on the basis of their fair value.

The group of shippers intervening in opposition express the belief that they will not, under the proposed plan, continue to enjoy existing routing privileges or receive equal service from all trunk lines entering Chicago, but will be forced to route over the Central as a matter of self-protection.

The second group of intervening shippers are desirous of preserving intact the present organization of the Junction and the same impartial service which they now enjoy and desire that the Central bind itself to accept certain conditions designed to insure that result.

[fol. 32] The Chicago Railway Terminal Commission fears that the project may prove deterrent to the adoption of the city's plan, not yet formulated, for the unification and co-ordination of all Chicago terminals, the establishment of universal freight stations and other measures which may hereafter be adopted to relieve congestion in the down town shipping district, and would prefer to have the Junction and River Road properties remain neutral pend-

ing the outcome of its investigations and the adoption, by legislation or otherwise, of a comprehensive policy.

As to values, the Central offered proofs tending to show that the present cost of reproduction of the River Road properties exceeds $3,000,000. Deducting the funded unmatured debt of $891,428.57 as of the date of the application, would leave an equity, it is asserted, of more than $2,000,000, represented by the capital stock of the par value of $500,000, for which the Central proposes to pay $750,000. Further proofs tend to show a present cost of reproduction for the Junction properties, including the value of its leases of considerably more than $33,000,000, represented in the proposed plan by the capitalization at 6 per cent of the $2,000,000 rental.

Estimates were introduced showing separately the cost of reproduction and cost less depreciation of road and equipment and the land values of the properties. Reproduction cost new was obtained by applying to the several quantities, as per inventory of the Bureau of Valuation, an average price for the year 1914, and applying thereto a multiple averaging 2.26 times the 1914 price, to obtain the cost new as of 1920. To these results were added normal percentages for engineering, general expenditures and interest during construction, and depreciation was applied to the whole in accordance with methods approved by the Bureau of Valuation. Adding struc- [fol. 33] tural going concern value, materials and supplies and working capital, a grand total of over $18,000,000 was obtained as the value of the Junction road and equipment, except land, and the corresponding figure for the River Road was, by the same methods, placed at over $2,000,000. An elaborate study of land value was presented, and analyzed at some length by experts in Chicago real estate values, the conclusion being that the lands of the Junction are valued in excess of $23,000,000, and those of the River Road at over $1,500,000. Further opinion evidence was given as to the commercial or market value of the properties from the standpoint of the Central and the additional worth of such properties to it because of the uses to which they can be devoted in developing the Central's traffic, the contention being that the value of the properties to the Central is greatly in excess of that value which may be assigned to them for rate making purposes.

It appears that the investment cost of the Junction property is impossible of accurate statement, because no proper accounts were set up until 1905, and since that time, it is stated, various important items have failed to find their way into the investment in road and equipment on the company's books. The investment reported by the Junction in 1920 for the purposes of the Advanced Rate Case (Ex Parte 74) was slightly in excess of $6,000,000. There is also evidence that the Junction officials as late as 1919 considered it proper to claim a value for rate making purposes of something over $17,500,000. Our Bureau of Valuation has not yet completed its tentative report on the properties pursuant to Section 19a of the Act.

Under all the circumstances it is not feasible to make a definite finding of value in this proceeding which shall be taken and ac-

cepted as a final judgment in the matter, and the conclusion herein reached renders such a finding unnecessary.

[fol. 34] On all the facts of record, it is concluded that for the purpose of this proceeding only, we may accept the position of the Central that the market value of the properties to the Central and its affiliated companies at this time is such as to justify the payment of a rental based on something more than the value for capitalization or rate making purposes. That is by no means saying, however, that its figures are to be accepted as the basis for permanent capitalization or for rate making, or that the Central is to be permitted to capitalize the intangible values by paying, through the River Road, permanent fixed charges on the basis of the market value claimed. Since the values are not at this time capable of definite settlement, it follows that such part of the application as relates to the purchase of the capital stock or the physical properties of the Junction will not be granted herein, but will be reserved for future treatment at such time as the Central may desire to renew its application in that respect, following the final determination of values under Section 19a of the Act.

It remains to discuss the disposition which should be made of those portions of the application which relate to the acquisition of the capital stock of the River Road by the Central and the proposed lease to the former of the properties of the Junction.

There are grave objections to an unconditional approval of the plan under consideration. Much testimony was adduced at the hearings, and divergent opinions were expressed, as to the relative merits of co-operative, singly controlled and independently controlled terminals. That discussion need not be reproduced here. The policies and plans of the city with respect to the general terminal situation have not yet fully developed, and it is obviously impossible for anyone to determine at this time the ultimate goal which ought to [fol. 35] be attained. It is believed, however, that pending final determination of future policies, the greatest good can be attained by the continuance, for the time being, of the competitive terminal situation. This can be best accomplished by bringing the present neutral Junction properties into closer relation with a trunk line like the Central. The Central's terminal facilities are relatively inadequate as compared with the competitor eastern trunk lines, but the Central controls extensive facilities for classification and interchange which are complementary to the Junction properties. The stronger competition and the connection between the Junction properties and the Harbor Belt facilities which would thus be brought about, would not only insure to the shippers of the Junction the necessary expansion and elasticity of facilities, together with the assistance of an interested trunk line in times of car shortage, and other emergencies, but would also remove congestion from the closely hemmed-in district served by the Junction and thus open facilities for expedition in the handling of traffic in and out, and also for handling traffic from one part of the city to another. It has been held that where such a transaction as the present one would clearly facili-

tate the movement of traffic through a highly congested district, the circumstances that other carriers would suffer a loss of revenue is not controlling. People ex rel. New York Central R. R. Co. v. Public Service Commission, 183 N. Y. S. 930.

There are in the record ample grounds for the belief that the Junction can no longer solve its problems without outside assistance, on the other hand, it is believed that the benefits pointed out by the Central can be made to accrue to the public by the consummation of the proposed plan. A prime factor in the situation is the circumstance that the general policy on all terminals in Chicago is that of equal opportunity afforded to all connecting carriers irrespective [fol. 36] of the ownership or control of a given terminal property by a single trunk line or by a group of trunk lines. Traffic is handled for all carriers in the same way and on the same terms, so that a shipper on terminals owned by a single carrier has the utmost freedom in routing via competing lines and apparently receives the same measure of service whether his shipment moves over the lines of the owning carrier or those of a competitor. Those shippers who appeared in opposition express the fear that they will not be accorded like treatment by the Central. The present management of the Central disclaimed any intention of making any changes in the method of handling competitive traffic or the general plan of operating the Junction properties, and those assurances may be taken at their face value, especially since the contrary policy would clearly be against the self-interest of the Central, in that it would thereby lose the good will of the shipper. There is, of course, every indication that the Central will be able to build up its own line-haul traffic as the result of its connection with the management of the Junction, and it by no means follows that harm to the public may result from legitimate effort and initiative to that end.

But we are not prepared, in any event, to authorize the consummation of the plan without making assurance doubly sure by the imposition of certain conditions. Those conditions relate partly to the method of operation of the property and partly to the treatment of the transaction by the corporations participating therein. Among the number are those matters enumerated by the shippers who have asked an approval of the plan with the understanding that certain agreements already made by the Central will be adhered to. Other matters are suggested by the group of shippers who took a neutral attitude at the hearing, such matters being agreed to on the record [fol. 37] by the applicant; and still others suggest themselves from the standpoint of an administrative body, as necessary in order to safeguard the public interest in the future. Stated concretely they are:

1. The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located in Chicago in order to preserve for the shipper the present direct access to the railroad officials.

2. The present neutrality of handling traffic in and outbound by the Junction and River Road organization shall be continued so as to permit equal opportunity for service to and from all trunk lines reaching Junction rails, without discrimination as to routing or movement of traffic which is competitive with the traffic of the Central, and without discrimination against such competitive traffic in the arrangement of schedules.

3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, insofar as such matters are within the control of the Central.

4. For the purpose of assessment of switching charges, the Junction and River Road shall continue to be treated as a single line to the same extent as at present, so that the carrying out of this plan will not in and of itself result in increasing the charge to any shipper for the service.

5. Subject to subsisting car service regulations, cars made empty on the rails of the Junction and River Road shall be available for outbound loading in the same manner and to the same extent as at present, irrespective of routing.

[fol. 38] 6. Whenever additional cars are required for outbound loading, because of inadequacy of available car supply on the Junction and River Road rails at any given time, for any cause, orders for such additional cars shall be accepted from the shipper by the local Junction organization and by it promptly transmitted to the designated trunk line without discrimination, and all cars ordered by and delivered to the Junction shall be promptly moved to the shippers by the Junction without discrimination on account of proposed routing.

7. The Junction shall accept, handle and deliver all cars in and outbound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

8. The National Code of Demurrage Rules, as in effect from time to time, including the average agreement, shall be applied by the Junction and River Road to each industry served by either of them on all in and outbound cars irrespective of what carrier or carriers may be interested in the line-haul.

9. Shippers served by the Junction and River Road shall be entitled to the same basis of switching charges as prevails in the Chicago switching district generally, and no attempt shall be made to establish any different basis of local or connecting line switching charges than that which prevails in the Chicago switching district generally for the same or similar service under substantially similar conditions.

10. No change shall be sought in the present method of basing rates to and from the Chicago switching district as a single point upon which rates are now based without regard to the character of the movement in and out of such district.

[fol. 39] 11. Present trap car arrangements for the transfer of l. c. l. freight at the Junction union station, at connecting line freight stations, or at connecting points reached by the Junction and River Road, shall be continued, but this condition shall not apply to routine changes in management and operation of trap car service.

12. Continuance of present operating arrangement on the Junction properties shall include the maintenance of existing shipping and billing arrangements at the Junction union freight station, insofar as such arrangements are within the control of the Junction.

13. The Junction shall, if ordered by us, establish station facilities for the receipt of inbound l. c. l. freight at a point convenient and accessible to shippers wishing to make use of the same, to which freight may be delivered by all trunk line carriers, without discrimination, and there distributed through the medium of the Junction's operating force.

14. Neither the approval of the purchase by the Central of the stock of the River Road for the sum specified, nor of the leasing to the latter of the properties of the Junction, shall be taken as establishing or tending to establish the fair value of the respective properties in any other proceeding, nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable.

15. The carrying out of the plan as authorized herein shall be taken to be without prejudice to the adoption of any plan or plans in the future by the City of Chicago, by us or by any other public agency, for unified or co-ordinated terminals, and neither the Central, the River Road nor the Junction shall urge the authority herein given or the situation resulting therefrom as a ground for [fol. 40] opposition to such plan or plans of said city, our plans or those of any other public agency.

16. Nothing contained in this authorization shall be taken as permitting the River Road and Junction properties to be considered as a part of a single system with that of the Central for any of the purposes of Section 15a or Section 20a of the Act.

17. Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction is retained to re-open the proceeding on our own motion for the same purpose.

Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road

and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest.

An order will be issued in accordance with the foregoing.

DANIELS, Commissioner, concurring:

I concur in the result reached in this report. I am, however, of opinion that the report should recognize explicitly that the application should have been entertained under Section 1, paragraph 18, of the Act; and that in accordance therewith a certificate of public convenience and necessity should be incorporated in the order entered.

I am authorized to state that Commissioner Campbell concurs in the views expressed above.

HALL, Commissioner, concurring in part:

If the powers of Congress are not adequate to deal with such a terminal situation as will result under the authorization here given [fol. 41] then they are not adequate to deal with the terminal situations which exist today in Chicago and many another city. The Pennsylvania, the B. & O., the North Western, for example, already have what the New York Central seeks in the way of lodgment, and, if it could not be dislodged, neither can they. If the powers of Congress are adequate, but those granted to this Commission as its agency are not, additional grant will be needed to meet existing conditions quite as much as to meet those which would result from the proposed acquisition.

No solution of the Chicago Terminal problem can be suggested which will not have to take into account the existing terminals of the 23 line-haul carriers serving that city as well as "independent" terminals like the Junction. Seven of the 23, competitors of the New York Central, are marshalled in opposition to what it seeks, but ready to join it in the acquisition and leave out the rest of the 23. The "neutrality" of the Junction will not be changed in respect of live stock, which constitutes about 35 per cent of its traffic. That has long been moved by each line-haul carrier to and from the stock yards over the Junction's rails and, as appears in the majority report "all parties concede that that is the only practical method of handling that traffic." Acquisition by the New York Central may ultimately facilitate rather than impede solution by more nearly equalizing the respective contributions of the line-haul carriers to the looked for "joint and co-operative terminal."

The facts warrant grant of authority without elaboration of conditions. Those imposed in the majority report seem to me vain, perhaps harmful, except Nos. 15 and 16, which should suffice if any are needed. I refrain from discussing the points of law. They will doubtless be settled by competent authority when occasion arises.

[fol. 42] MEYER, Commissioner, dissenting:

The Chicago Junction Railroad and Chicago River and Indiana Railroad are now open terminals. According to the [illegible]

testimony the Junction is the best type of open terminal to be found anywhere in the United States. What the majority approves in this report may in the future restrict the use of and close these terminals to competitors on equal terms. That is why I cannot concur in the report.

To be sure, there are conditions in the order, the intended purpose of which is to prevent the imposition of restrictive features in the use of the Junction Railroad. I am not satisfied that those conditions can be adequately enforced, or that their enforcement, because of the necessary inflexibility when they are imposed as conditions, will not unduly hamper operations within the terminal.

The future of our railroads and the character of their service to the public depends largely upon the manner in which terminals will be used. For many years cases involving the use of terminal properties by competitive railroads have been before us. The one insuperable obstacle to the free use of terminals as reflected in these cases has been the insistence on the part of the owning carriers upon their technical legal rights as a result of which much injustice has been done to individual shippers and the free development of industry hampered. Railroad companies seem to take the view that the public use of terminal properties is more limited than the use of their other properties devoted to the public service. The familiar distinctions between and differences in treatment of competitive and non-competitive traffic, short-hauling, and other considerations, have been invoked in order to defeat what in my judgment the commerce of this country clearly requires. My personal views regarding certain features of terminal situations are perhaps more fully reflected in our report in the Peoria & Pekin Union Case, 26 I. C. C., 226, [fol. 43] than in some of the other terminal cases, and need not be restated here. Among the leading cases on this subject the following may be mentioned: Associated Jobbers of Los Angeles v. A., T. & S. F. Ry. Co., 18 I. C. C., 310, April 5, 1910; Manufacturers' Ry. Co. v. St. L., I. M. & S. Ry. Co., 21 I. C. C., 304, June 21, 1911; Merchants' & Manufacturers' Asso. v. P. R. R., 23 I. C. C., 474, May 14, 1912; Morris Iron Co. v. B. & O. R. R. Co., 26 I. C. C., 240, December 2, 1912; St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co., 26 I. C. C. 226, February 10, 1913; Manufacturers' Railway Co. v. St. L., I. M. & S. Ry. Co., 28 I. C. C., 93, June 21, 1913; Buffalo, Rochester & Pittsburgh Ry. v. Pennsylvania Co., 29 I. C. C., 114, December 3, 1913; Waverly Oil Works Co. v. P. R. R. Co., 28 I. C. C., 621, December 3, 1913; Traffic Bureau of Nashville, Tenn., v. L. & N. R. R. Co., 28 I. C. C., 533, December 9, 1913; Manufacturers' Railway Co. v. St. L., I. M. & S. Ry. Co., 32 I. C. C., 100, July 10, 1914; City of Nashville v. L. & N. R. R. Co., 33 I. C. C., 76, February 1, 1915; Louisville Board of Trade v. L. & N. R. R. Co., 40 I. C. C., 679, July 5, 1916; Richmond Chamber of Commerce v. S. A. L. Ry., 44 I. C. C., 455, April 28, 1917; The New York Harbor Case, 47 I. C. C., 643, December 17, 1917.

In the instant case the New York Central management has manifested a commendable departure from the old theories of restrictive and selfish use of railroad terminals by their owners, but although

the applicants have agreed to conditions which, if made effective, would prevent in large part the ancient evils, there is and can be no adequate guaranty that through the imposition of switching charges, car supply, hours of interchange, and other means the commerce of Chicago tributary to the Junction may not some day be burdened by the assertion of individual rights of the owners acquired through this proceeding.

[fol. 44] Before we can grant authority, under the transportation act, 1920, for this transaction it must appear affirmatively that the public interest will be thereby promoted. It is not sufficient to show that no detrimental effects will follow. The sole advantages pointed out by the majority report are the acquisition of additional downtown terminals in Chicago by the Central, the operation of the Junction and Harbor Belt as a unit with the corollary opportunity for expansion upon the outer belt, and the direct financial backing of a proprietary trunk line. The present terminals are open to the Central on the same terms as are afforded other roads. The prophesied advantages of unified operation are vague and indefinite, potential rather than actual. No complaint has been made as to present service or facilities, and there is evidence that the existing properties are not now used to full capacity. The remoteness of the hinted advantages which are the necessary basis for our approval is indicated by the terms of the order which eliminate from the transaction all prospect of present public gain by rigid maintenance of the existing times and places of interchange, and compulsory adherence to existing operating conditions.

The problem of terminals cannot be solved in a year. It is a continuing one capable of solution only gradually by successive steps in the right direction in each locality. The present may prove to be a serious step in the wrong direction.

Commissioner Aitchison authorizes me to state his concurrence in this dissent.

STMAN, Commissioner, dissenting:

This proceeding has to do with a terminal railroad property in the City of Chicago serving the greatest market for live stock and [fol. 45] packing-house products in the world and an industrial district already highly developed and capable of much expansion. For many years this property has been operated independently with financial profit to its owners and to the satisfaction of its trunk line connections and of the shippers which it serves, and it is so operated at the present time.

It is now proposed, in effect, to transfer this property in perpetuity to one of its trunk-line connections, the New York Central, by means of a lease at a rental of $2,000,000 per year. We are asked to certify under paragraph 18 of section 1 of the interstate commerce act that public convenience and necessity require this transfer, and also to approve it under paragraph 2 of section 5. There is nothing in either the report or order of the majority that purports to be or is a certificate of public convenience and neces-

sity and it must be assumed, therefore, that the order is based on paragraph 2 of section 5. In my judgment such a transfer as is contemplated is subject to paragraph 6 rather than paragraph 2 of section 5, and can not lawfully be approved by us until a plan of consolidation has been adopted under paragraph 5 of that section. However, in view of the conclusion which I have reached with respect to the merits of what is proposed, I shall not undertake to discuss questions of law at this time.

The rental of $2,000,000 per year is equivalent to six per cent upon $33,333,333. There is nothing of record to show that the actual investment in this terminal property has been much in excess of $6,000,000, and it clearly appears that by far the greater part of the investment has been derived from surplus earnings. The compensation to be paid for the property is thus very high, and in itself is reason for scrutinizing the transaction with great care. I am not in accord with the theory that the right of railroads or other public utility companies to a return, through the medium of charges [fol. 46] for the service which they furnish, upon unearned increment in real estate values or upon property representing the investment of surplus earnings is unqualified or unlimited. In this instance it appears that the earnings of the property have been almost wholly derived from trackage or switching charges which have been paid or absorbed by the trunk-line connections. It follows that they have not been a matter of concern to shippers and that their reasonableness has not been tested.

The suggestion was made on argument that if owners of a property have an opportunity to dispose of it on advantageous terms, it would be an invasion of their constitutional rights if we should refuse to permit the transaction to be consummated. The fallacy of the suggestion is obvious. Owners may have a constitutional right to sell if they can find a purchaser willing and able to buy, but railroad corporations clearly have no constitutional right to buy. The question before us is not whether the owners of this terminal property may sell, but whether the New York Central may purchase. If public control had been exercised over similar purchases by the New York, New Haven & Hartford, great economic waste might have been avoided. The suggestion that such control would have been an invasion of constitutional rights is not one that will appeal to the good sense of the community.

But I do not rest my dissent either upon questions of law or upon questions of price. A fundamental issue of policy is at stake. The proposed transaction is strongly urged by the New York Central and with equal energy condemned by the competing trunk lines. It is opposed by some of the interested shippers and favored, on paper at least, by more. To my mind, however, a most significant and important fact is the opposition of the Chicago Railway Terminal Commission, an official commission of the city of Chicago, [fol. 47] created by ordinance and charged with the duty of studying the railway terminal situation, both passenger and freight, in that city.

We are here dealing with a problem which, in many of its aspects,

is essentially local and for that reason, if for no other, the views of this Chicago Railway Terminal Commission would be entitled to great weight. They are the more persuasive, however, because they are the views of men of known reputation and ability who have made a study of the railway terminal situation, not only of Chicago, but of many of the more important cities of the United States, Canada, and Europe, and because they are views which in themselves have force because of their intrinsic merit.

The Chicago commission is impressed, as a result of its investigations, by the vast importance of the railway terminal problem in this country and the opportunities which its proper solution offers for the elimination of waste and the improvement of service. The following passages from its preliminary report indicate the trend and the basis of its views.

With respect to terminal facilities and services, at least, the advantages of competition seem negligible when compared with its disadvantages. * * *

The complete application of the competitive system to railway freight terminals falls of its own weight. Each road cannot secure and maintain terminal facilities covering the entire terminal area of such a city as Chicago. It cannot secure, maintain and operate adequate facilities in each and every section or district within the metropolitan terminal area where important freight traffic is to be had. In many cases this is physically impracticable, and in many more cases it is financially impracticable. Nevertheless, the attempt is made—under existing methods—to cover as much as possible of the entire field by separate and competitive terminals, with the resultant complication of facilities, and a financial investment not justified by the revenue earned.

[fol. 48] * * * In the terminal district of Chicago as a whole—and the same thing applies to other cities—the unnecessary complication of terminal facilities and operating costs is so extensive that it is appalling in its effect upon the railroads, the shippers and the public; and the future outlook along these lines is by many—in and out of railroad service—believed to be becoming worse and worse. The investments by railroads in unused or little used property to protect real or fancied competitive positions or interests, is also a source of great expense to the railroads and ultimately to the public—although not often fully realized as such. The interest on these investments is absorbed in the general interest charges on the entire property and is thus lost sight of as being an expense due to unproductive investments, nor is due allowance made for the natural accretion in the value of such property, which is often withheld from profitable use for considerable periods of time.

If the terminal situation were treated co-operatively instead of competitively, there would be an immediate simplification of the tangled network of tracks that now exist; the release for general commercial purposes of much valuable property now held by railroads for present competitive purposes or prospective competitive needs; the reduction of operating costs in the terminal handling of

freight and the increase of efficiency. To the public this would mean not only the improvement of the service to the shippers, but the reduction of the street congestion and the removal of existing obstacles to the growth and development of the city.

And by such reasoning it arrives at the following general conclusion:

It is already clear, however, that the key to the solution of our railway terminal problem—with respect to freight as well as with respect to passengers—is to be found in the substitution of joint and co-operative terminals for separate and competitive terminals; this substitution to be brought about not by some sudden or drastic adoption and execution of a complete revolutionary plan covering the whole railway terminal situation, but by such steps as may be taken from time to time with due regard to financial and operating con- [fol. 49] ditions. Certain important steps of this character undoubtedly can and should be taken at once or in the near future for the establishment of co-operative terminals and the readjustment of existing terminals to conform to correct principles of terminal development. *But the essential thing is that from now on no steps shall be taken in the opposite direction, thus creating unnecessary barriers to proper development in the future.*

In its opinion, the issue in this proceeding is "whether it will be more in the public interest to have the Chicago Junction Railway controlled by a single terminal agency controlling also the other terminal facilities within the Chicago terminal district, or to have the Chicago Junction Railway controlled by a single trunk line such as the New York Central Railroad. Or, rather, the issue is whether if the former be the better public policy the acquisition of the control of the Chicago Junction Railway at this time by the New York Central Railroad will constitute an obstacle to the future adoption and development of the sounder public policy." The Chicago commission answers this latter question in the affirmative; but it asks and earnestly urges that for our own guidance and the guidance of the railroads and of the public we reach our own conclusions, before approving the transaction here proposed, as to the "principles of a sound and beneficial railway terminal policy to which future development should be made to conform," and decide this case accordingly.

In this connection it calls our attention to the following statement of former Chairman Clark of this commission before the Committee on Interstate and Foreign Commerce of the House of Representatives in July, 1919:

If I had my way I would begin this idea of merger and co-operation with the terminals and I would provide, if I had my way and the direction of it, in every large commercial center for a terminal association or corporation which would be a separate entity. I [fol. 50] would make it the terminal agency of all the roads that reach the place operated as nearly as could be figured out at cost.

Then the railroad serving that place would turn over the traffic destined to the place to this terminal agency and it would be delivered where the consignee wanted it delivered on any of the tracks. There would not be any question about closed or open terminals; there would be one terminal for all.

Mr. Rayburn: You think that would be an efficient arrangement?

Mr. Clark: I do, yes sir.

Mr. Rayburn: It would mean in all probability a saving?

Mr. Clark: A great saving in expenditure, a great increase in efficiency and the elimination of endless friction.

It also directs our attention to the following passage from the report on "Consolidation of Railways" made to us by William Z. Ripley and appearing in Consolidation of Railroads, 63 I. C. C., 455, at pages 483-4:

But whatever the cause for the existing situation, a practically universal demand of shippers is that they be able freely to exercise their routing rights by the provision of open terminals, both at the point of shipment and at destination. The right of route across country is impaired if the only possible delivery is at an inconvenient point. To put together railway lines on the map without having a constant regard to the possibility of free delivery or receipt at either end would indeed be futile. As to the particular means for accomplishment of this object—free and untrammeled utilization of terminals—there may well be difference of opinion. Conceivably, joint ownership and operation, as at St. Louis, may succeed in that environment, while reciprocal switching may satisfactorily answer the purpose as at Chicago. But, whatever the means adopted to this end, it is submitted that a *proper adjustment of the various terminal situations, always of course for due compensation, is an important adjunct to any comprehensive consolidation plan.* No recommendation, therefore, as to particular terminal remedies is offered in this report. The subject technically is so in- [fol. 51] volved, that it might well be made matter for a special investigation. Its bearing upon and relation to the subject of the division of through rates is as obvious as its intimate connection with consolidation. *The pending New York Central application to acquire the Chicago Junction Railway raises in itself almost all the possible aspects of terminal problems.* Consolidation can never be effectively brought about without the adoption of a comprehensive policy as to terminal ownership, operation, or both. It is herein assumed that free access will be somehow provided, either under the present emergency powers as contained in Section 1, paragraph 15c or by the adoption under a consolidation plan of permanent arrangements in all of the important centers. Possibly the assignment of terminal properties might take place by means of leases based upon valuation by the Commission and at a rate fixed by the Commission as reasonable. This would permit the terminal

companies to remain under the joint control of the several participating railroads, rather than that entirely independent terminal companies, actually owing these facilities, should be set up. The important point, whatever the means adopted to this end, is that there should be unified operation and entirely free access to all participants alike. (Italics mine.)

The majority dismiss the plea of the Chicago commission with the statement that it is "obviously impossible for any one to determine at this time the ultimate goal which ought to be attained." Pending final determination of future policies, they believe that "the greatest good can be attained by the continuance, for the time being, of the competitive terminal situation" and think that this can best be accomplished "by bringing the present neutral Junction properties into closer relation with a trunk line like the Central." Nevertheless they are apparently sufficiently in doubt as to the good to be attained from this "continuance" of competition so that they feel it necessary to surround the transaction by 17 more or less com- [fol. 52] plicated conditions which can only be enforced, if at all, by constant surveillance and policing.

I have little sympathy with this plan of conditions. Either the transaction should be approved, or it should be disapproved. If it is not so meritorious that it will yield good results in the natural course of events, it never can be made to do so by all manner of paper commandments. But, aside from this, I submit that what the majority are proposing is in no sense a "continuance of the competitive terminal situation," but rather an enlargement and extension of this situation. What has been neutral will cease to be neutral, and to that extent it will be more difficult to retrace our steps if we finally discover that "the ultimate goal which ought to be attained" is not competition but cooperation. And the situation is in this respect the more serious in that we are here dealing with a terminal property serving exclusively the greatest market for live stock and packing-house products in the world. The transfer of such a property, now neutral, to the possession of a single trunk line is most assuredly no small or insignificant departure from a policy of terminal cooperation and coordination.

For my own part I do not believe that it is at present impossible to determine the "ultimate goal to be attained." If it is impossible, we can at least follow the best light that we now have, and certainly we ought not to delude ourselves into believing that we are maintaining the status quo when we are in fact countenancing a very radical and important step towards one possible ultimate goal and away from another. Moreover, I have no hesitation in expressing a conviction, based on such knowledge as I now have, that former Chairman Clark and the Chicago Railway Terminal Commission are right in believing that the ultimate goal is the "substitution of joint and co-operative terminals for separate and competitive ter- [fol. 53] minals," and that the attainment of that goal would make possible far-reaching economies and improvements in service.

I agree also with the Chicago commission that the public benefits which the New York Central claims will flow from the acquisition

of the Junction property are either vague, uncertain, and illusory or quite possible of attainment without such acquisition. The record does not support the conclusion that there will be any public loss if the transaction is disapproved. In my opinion it will be an obstacle to the future proper solution of the Chicago terminal situation, will embarrass our determination of a plan of consolidation under Section 5 of the Interstate Commerce act, will be contrary to the public interest, and ought not to be approved.

Commissioner Cox also dissents.

[fol. 54]

Order

At a General Session of the Interstate Commerce Commission Held at its Office in Washington, D. C., on the 16th Day of May, A. D. 1922.

Finance Docket No. 1165

In re Application of the New York Central Railroad Company for Authority and for a Certificate of Public Convenience Evidencing the Commission's Approval in Respect of the Following:

(a) The purchase by the New York Central Railroad Company of all of the capital stock of the Chicago River & Indiana Railroad Company.

(b) The leasing by the Chicago Junction Railway Company for a term of 99 years and thereafter at the election of the lessee in perpetuity of all its properties (owned and leased) to the Chicago River & Indiana Railroad Company.

(c) The granting to the New York Central Railroad Company of an option to purchase all of the capital stock of the Chicago Junction Railway Company or all of the properties to be leased by it to the Chicago River & Indiana Railroad Company; all pursuant to the provisions of paragraphs (18) to (20), inclusive, of section 1 and of paragraph (2) of section 5 of the Interstate Commerce Act.

A hearing and investigation of the matters and things involved in this proceeding having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of facts and conclusions thereon, which said report is hereby referred to and made a part herof:

It is ordered, That the acquisition by the New York Central Rail-
[fol. 55] road Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock at a price not exceeding the sum of $750,000 be, and the same is hereby, approved and authorized.

It is further ordered, That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized.

Provided, That the right to prescribe the term, methods and character of securities, if any, which the New York Central Railroad Company may employ to effectuate the purchase of the capital stock of the Chicago River & Indiana Railroad Company be, and it is hereby, reserved to the Interstate Commerce Commission; and provided further, that the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17 inclusive.

It is further ordered, That said application, so far as it seeks authority to purchase the capital stock or the physical property of the Chicago Junction Railway Company, be, and the same is hereby, denied without prejudice to future proceedings.

By the Commission:

George B. McGinty, Secretary. (Seal.)

[fol. 56] EXHIBIT 2 TO BILL OF COMPLAINT

Before the Interstate Commerce Commission

Finance Docket, No. 1165

In re Application of THE NEW YORK CENTRAL RAILROAD COMPANY for Authority and Certificate of Public Convenience and Necessity to Acquire and Operate the Chicago Junction Railway and Chicago River and Indiana Railroad, etc.

Petition on Behalf of Intervening Carriers for Modification of Report and Order

Now come the Baltimore & Ohio Railroad Company; The Chesapeake & Ohio Railway Company of Indiana; Chicago, Indianapolis & Louisville Railway Company; Chicago & Erie Railroad Company; Grand Trunk Western Railway Company; The Pennsylvania Railroad Company; The Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company, and Wabash Railway Company, and present this their petition for modification of the report and order issued May 16, 1922, and in support thereof state as follows:

I. In the majority report there is no finding that the order herein is issued either under paragraphs (18) to (20), inclusive, of Section 1, or under paragraph (2) of Section 5 of the Interstate Commerce

Act; but the following circumstances indicate that the order was issued under the latter section:

[fol. 57] (a) Commissioner Daniels, in his concurring opinion, in which Commissioner Campbell joins, states that the report "should recognize explicitly that the application should have been entertained under Section 1, paragraph (18), of the Act; and that in accordance therewith a certificate of public convenience and necessity should be incorporated in the order entered."

(b) Commissioner Eastman in his dissenting opinion, states "There is nothing in either the report or order of the majority that purports to be or is a certificate of public convenience and necessity and it must be assumed, therefore, that the order is based on paragraph (2) of Section 5."

(c) No certificate of convenience and necessity is found either in the report or in the order. The concluding paragraph of the majority opinion is "Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest," the concluding phrase being verbatim that set forth in paragraph (2) of Section 5 as the finding which the Commission must make before authorizing the acquisition sought.

The foregoing is all that is contained in the report bearing upon this question.

On pages 10 and 11 of the exceptions filed by these intervening carriers to the revised tentative report, exceptions were taken to the failure of the revised tentative report "to set forth specifically the provision of the statute, if any, which authorizes the issuance of the order proposed in the tentative report." In the suggestions in support of the foregoing exception, these intervening carriers respectfully [fol. 58] asked this Commission "to state unequivocally under what provision of the statute the order is issued."

It is of the utmost importance to all parties interested in the operation of the Chicago Junction and the River Road that the report and order establish beyond cavil that the terms and conditions set forth on pages 7 to 9 are as obligatory and effective upon the corporations and persons interested in the operation of the road, as it is possible to make them, under the provisions of the law. Paragraph (20) of Section 1 of the Interstate Commerce Act gives the Commission power to issue a certificate of convenience and necessity and to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." It is further provided that any carrier or any director, officer, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to or permits any violation of the provisions of paragraph (20) or of paragraph (18) shall, upon conviction, be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both such fine and imprisonment. Furthermore, an injunction at the suit of the United States, the Com-

mission, any regulating body of the state, or any party in interest, is authorized against any operation contrary to the provisions of paragraph (20).

Paragraph (2) of Section 5 empowers the Commission to approve and authorize the acquisition referred to in said paragraph "on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises;" but when the action of the Commission is taken upon an application under paragraph (2) of Section 5, there is no provision for penalty to be applied for a violation of the terms and conditions such as are attached to the order in this case [fol. 59] Certainly the Commission should not fail to make a specific finding as to the source of the authority under which the Commission's order is issued.

We therefore respectfully request a modification of the report and order so that the same will definitely show under which section of the statute the order is entered.

II. The majority opinion makes no finding as to whether the proposed acquisition by purchase of capital stock by the New York Central Railroad Company of the Chicago River & Indiana Railroad Company involves the consolidation of such carriers into a single system for ownership and operation; nor does the Commission find whether the lease by the Chicago River & Indiana Railroad Company of the properties of the Chicago Junction Railway Company involves a consolidation of the Chicago River & Indiana Railroad Company, the Chicago Junction Railway Company and the New York Central Railroad Company, into a single system for ownership and operation.

We respectfully request a modification of the report and order in this case, so as specifically to find:

(a) Whether the acquisition by the New York Central Railroad Company of control of the Chicago River & Indiana Railroad Company by the purchase of all the capital stock of the latter under the plan set forth in the application and as more specifically outlined in the testimony of Mr. A. H. Smith, involves the consolidation of such carriers into a single system for ownership and operation; and,

(b) Whether the acquisition by the Chicago River & Indiana of control of the Chicago Junction Railway Company, under a lease for ninety-nine years, renewable in perpetuity thereafter at the option of [fol. 60] the lessee, involves the consolidation of such carriers into a single system for ownership and operation; and

(c) Whether the proposed acquisition of the Chicago Junction properties by the Chicago River & Indiana Railroad Company by lease for ninety-nine years, renewable in perpetuity at option of the lessee, is a consolidation of their properties into one corporation for the ownership, management and operation of properties theretofore in separate ownership, management and operation.

III. The Commission finds on page 3 that "Earnings of the Junction in the past have not been such as to permit the expansion of its facilities to meet the growing requirements of the districts served; and this is true as to interchange as well and switching and team track

facilities." On page 7 it is found "There are in the record ample grounds for the belief that the Junction can no longer solve its problems without outside assistance. On the other hand, it is believed that the benefits pointed out by the Central can be made to accrue to the public by the consummation of the proposed plan."

There is no evidence or fact disclosed by the record upon which the Commission can make any such finding. We call particular attention to the exceptions on this subject contained on pages 12 to 14 of the exceptions on behalf of these petitioners, dated March 1, 1922. In so important a matter as that at issue in this case, the Commission's findings as to the public interest should not be based upon conjecture, theory, or opinion; only facts of record can furnish a basis for a finding that the proposed acquisition will be in the public interest.

We have insisted from the beginning that the record contains no [fol. 61] evidence upon which any finding can be made that granting the applications herein will be in the public interest. With a specific challenge that the record contains no such findings, we submit that the Commission should specifically point out wherein the record contains any basis for the finding that public interest will be served by granting the application herein.

We respectfully request that the Commission set forth, either verbatim or by reference to page and exhibit in the record, the evidence upon which its findings in this respect are based.

IV. Terms and conditions of the lease of the properties of the Chicago Junction Railway Company have not been perfected, or at least have not been submitted to this Commission for its examination and approval. No order can be made by the Commission approving the transaction until the Commission knows fully what the transaction is and all the terms in connection therewith.

We, therefore, respectfully request that the Commission modify its report to the extent of withholding approval until the terms of the lease and all documents in connection therewith, fully executed by the stockholders of all corporations parties thereto, have been submitted to, and approved by, the Commission.

V. The conclusion is reached by the majority of the Commission that the issuance of the order and granting the authority sought by the applicant, subject to the observance of certain conditions, will be in the public interest. For reasons stated in the brief, in the oral argument, and in the exceptions filed on behalf of these petitioners both [fol. 62] to the original and revised tentative reports, the Commission should deny the application; we therefore respectfully request a modification of the report and order so that the same shall include a finding that the proposed acquisition sought by the application in this case, is not in the public interest and should be denied.

Dated at Chicago, May 29, 1922.

Luther M. Walter, John S. Burchmore, Attorneys for Intervening Carriers, 1620 First National Bank Bldg., Chicago, Ill.

[File endorsement omitted.]

[fol. 62½] [Title omitted]

[fol. 63] UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

SUBPŒNA AND RETURN—Filed Apr. 26, 1923

The President of the United States of America to United States of America, Greeting:

We Command You and Every of You, That you be and appear before our Judges of our District Court of the United States of America, for the Northern District of Illinois, at Chicago, in the Eastern Division of said District, on or before the thirtieth day after service of this writ, exclusive of the day of service, to answer or otherwise defend against a certain bill in equity heretofore filed by The Baltimore & Ohio Railroad Company, et al., in the Clerk's office of said Court, in the City of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the District of Columbia to Execute.

Witness the Honorable George A. Carpenter, Judge of the District Court of the United States of America, for the Northern District of Illinois, at Chicago aforesaid, this 21st day of April in the year of our Lord One Thousand Nine Hundred and 23 and of our Independence the 147th year.

John H. R. Jamar, Clerk. (Seal.)

Memorandum

The defendant is required to file its answer or other defense in the Clerk's office on or before the thirtieth day after service hereof upon it, excluding the day of service; otherwise the said bill may be taken pro confesso.

John H. R. Jamar, Clerk.

U. S. Marshal's Office, Washington, D. C., April 24, 1923.

Served copy of the within subpœna on the United States of America by service of the same on A. T. Seymour, acting Attorney General of the United States, in person the 23rd day of April, 1923.

E. C. Snyder, U. S. Marshal. By W. B. Robinson, Chief Deputy Marshal.

Fee $1.00.

[fol. 64] [File endorsement omitted.]

[fol. 65] [Title omitted]

[fol. 66] UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

SUBPŒNA AND RETURNS—Filed May 1, 1923

The President of the United States of America to United States of America, the New York Central Railroad Company, Chicago River and Indiana Railroad Company, the Chicago Junction Railway Company, the Chicago Junction Railways and Union Stock Yards Company, and Richard Fitzgerald, Greeting:

We Command You and Every of You, That you be and appear before our Judges of our District Court of the United States of America, for the Northern District of Illinois, at Chicago, in the Eastern Division of said District, on or before the twentieth day after service of this writ, exclusive of the day of service, to answer or otherwise defend against a certain bill in equity this day filed by The Baltimore & Ohio Railroad Company, et al., in the Clerk's office of said Court, in the City of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.
To the Marshal of the Northern District of Illinois to Execute.

Witness the Honorable George A. Carpenter, Judge of the District Court of the United States of America, for the Northern District of Illinois, at Chicago aforesaid, this 19th day of April in the year of our Lord One Thousand Nine Hundred and 23 and of our Independence the 147th year.

John H. R. Jamar, Clerk. (Seal.)

Memorandum

The defendants are required to file their answer or other defense in the Clerk's office on or before the twentieth day after service hereof upon them, excluding the day of service; otherwise the said bill may be taken pro confesso.

John H. R. Jamar, Clerk.

[fols. 67 & 68] [File endorsement omitted.]

I have executed this writ within my district in following manner to wit: By delivering a true copy thereof to the within named New York Central R. R. Co. (By C. H. Brister Vice-pres.) & the Chgo. River & Indiana R. R. Co. (By Geo. Hannamen Vice-pres.) & the Chgo. Junction Railway Co. (By Richard Fitzgerald Pres.) & Richard Fitzgerald at Chicago, Ill., April 23, April 25, April 25 & April

25, 1923. Respectively and at same time delivered to each a bill of Complaint.

R. R. Levy, U. S. Marshal. Jno. J. Oros, Depy

(Other not served by request of Atty.)

4 Services	8 00
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[fol. 69] IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

MOTION OF THE UNITED STATES TO DISMISS THE BILL OF COMPLAINT —Filed June 13, 1923

United States of America, one of the defendants in the above-entitled cause, by its counsel, now comes and moves the court to dismiss the bill of complaint herein for want of jurisdiction and at the cost of the plaintiffs.

As grounds for this motion it is shown—

1. The suit is not a suit against the United States pursuant to the Commerce Court Act of June 18, 1910, Ch. 309, 36 Stat. 539, and the Urgent Deficiencies Act of October 22, 1913, Ch. 32, 38 Stat. 219-221, to enjoin, set aside, annul or suspend an order of the Interstate Commerce Commission; but by naming the United States as a defendant the plaintiffs undertake to establish jurisdiction before a special court of three judges and then to conduct a case on the merits of the controversy between plaintiffs and the defendants other than the United States.

[fols. 70 & 71] 2. The order entered May 16, 1922, by the Interstate Commerce Commission is a mere negative order in so far as it relates to the plaintiffs and a mere permissive order in so far as it relates to the defendants other than the United States, against which order a suit to enjoin, set aside, annul or suspend will not lie under Commerce Court Act of June 18, 1910, Ch. 309, 36 Stat. 539, and the Urgent Deficiencies Act of October 22, 1913, Ch. 32, 38 Stat. 219-221.

Wherefore, defendant prays that its motion to dismiss for want of jurisdiction be sustained.

Blackburn Esterline, Assistant to the Solicitor General. Edwin A. Olson, United States Attorney, Northern District of Illinois.

[File endorsement omitted.]

[fol. 72] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

MOTION ON BEHALF OF THE DEFENDANTS THE NEW YORK CENTRAL RAILROAD COMPANY AND THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY TO DISMISS BILL OF COMPLAINT—Filed May 7, 1923

And now comes the New York Central Railroad Company and The Chicago River and Indiana Railroad Company, defendants in the above entitled cause, by their solicitors, Robert J. Cary, Edward T. Glennon, Bertrand Walker and Sidney C. Murray, and move the Court to dismiss the Bill of Complaint filed therein, and in support of said motion assign the following reasons:

[fol. 73] 1. Said Bill, with the exhibits attached thereto and made a part thereof, is without equity on its face and does not state any cause of action against the defendants, or any of them, and the court may not grant the relief prayed for, or any part of the same. Wherefore said bill should be dismissed for want of equity.

2. Said Bill, with the exhibits attached thereto and made a part thereof, does not state facts sufficient to constitute a valid cause of action in equity against these defendants ei her severally or jointly with the other defendants impleaded with them.

3. Said Bill shows on its face that said plaintiffs have no right, title or interest, legal, equitable or otherwise, entitling them, or any of them, to bring suit to enjoin, set aside, annul, suspend or restrain the enforcement, operation and execution of said order of the Interstate Commerce Commission entered May 16th, 1922, or for any of the relief prayed for against the defendants, or any of them.

4. The allegations of fact of said Bill of Complaint are not sufficient to show that the order of the Interstate Commerce Commission entered May 16th, 1922 should be enjoined, set aside, annulled, suspended or restrained.

5. Said Bill, with the exhibits attached thereto and made a part thereof, does not show that said order of May 16th, 1922 of the Interstate Commerce Commission, or any compliance therewith, has [fol. 74] violated at law or equity any right or interest of said plaintiffs, or of any or either of them, or has deprived them of property, or caused them any loss, damage or injury.

6. It appears by the plaintiffs' own showing in their said Bill of Complaint that this suit is not brought and is not being maintained pursuant to the provisions of Chapter 32 of the Urgent Deficiency Appropriations Act approved October 22nd, 1913 (38 Stat. L. 219-220) for the purpose of enjoining, setting aside, annulling, suspending and restraining the enforcement, operation and execution of said

order of the Interstate Commerce Commission entered May 16th, 1922, but that said plaintiffs are attempting to avail themselves of the provisions of said Act and have made the United States of America a party defendant, pursuant to the requirements of said Act, for the sole purpose of seeking to set aside as between the defendants other than the United States the sale and purchase of certain stock and the execution of a certain lease, and to enjoin and restrain said defendants from consummating and carrying into effect said transactions.

7. Said Bill of Complaint shows that it is to all intents and purposes a suit in equity brought against The New York Central Railroad Company, The Chicago River and Indiana Railroad Company, The Chicago Junction Railway Company, The Chicago Junction Railways and Union Stock Yards Company, corporations, and Rich- [fol. 75] ard Fitzgerald, defendants, and not a suit against the United States of America to set aside an order of the Interstate Commerce Commission.

Under such circumstances it appears from the allegations in said Bill contained that this court has no jurisdiction to hear and determine this suit.

8. Said Bill shows upon its face that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court.

9. The said defendants, The New York Central Railroad Company and The Chicago River and Indiana Railroad Company, jointly and severally move that the portion of the Bill of Complaint in the above entitled cause insofar as it is based upon or seeks any relief as to the extent to which the defendants have acted under the order of the Interstate Commerce Commission entered May 16, 1922, and insofar as discovery is prayed for under Subdivision XII and sub-paragraphs 1 to 12 inclusive of said Bill of Complaint be dismissed upon the ground that this court has no jurisdiction to grant the relief prayed for therein.

10. And the said defendants, The New York Central Railroad Company and The Chicago River and Indiana Railroad Company and each of them further move that as to the prayer for relief set forth on page 19 of said Bill of Complaint beginning with "And plaintiffs further pray that a preliminary or interlocutory order or [fol. 76] injunction be entered" including paragraphs 1 to 16, inclusive, on pages 20, 21 and 22 of said Bill of Complaint and the paragraph on page 22 of said Bill of Complaint following said paragraph 16, be dismissed, on the ground that the court has not jurisdiction to grant said relief under and pursuant to the provisions of Chapter 32 of the Urgent Deficiency Appropriations Act, approved October 22nd, 1913 (38 Stat. L., 219-220).

11. It appears on the face of said Bill that the relief prayed for is barred by the delay and laches of the plaintiffs and each of them and that so long a time has passed since the matters and things

complained of took place that it would be contrary to equity and good conscience for this court to take cognizance thereof or to enforce any further or other answer thereto.

12. Said Bill is multifarious.

13. Plaintiffs are improperly joined, because it appears from said Bill that their alleged causes of action are several and not joint within the meaning of Federal Equity Rule No. 26.

14. There is no provision in paragraphs (18) and (20) of Section 1 of the Act to regulate commerce, nor in paragraph (2) of Section 5 of said Act, nor in any other paragraph of said Act which requires The Chicago River and Indiana Railroad Company to file with the Interstate Commerce Commission a petition for authority, [fol. 77] or to obtain a certificate of convenience and necessity in respect of matters and things referred to in paragraphs 11 and 14 of Subdivision X of said Complaint.

15. There is nothing in paragraphs (18) and (20) of Section 1 of the Act to regulate commerce, nor in paragraph (2) of Section 5 of said Act, nor in any other provision of said Act, which requires The Chicago River and Indiana Railroad Company to obtain the authority of, or a certificate of convenience and necessity from the Interstate Commerce Commission before leasing the property of The Chicago Junction Railway Company, or doing any of the acts alleged in said Bill of Complaint to have been done by it.

16. Said Bill is argumentative.

17. Said Bill is defective and uncertain in that:

(a) The Bill does not aver that from the date of the entry of said order of the Interstate Commerce Commission, namely, May 16th, 1922, to the date of the filing of said Bill of Complaint the plaintiffs have suffered any damage whatsoever.

(b) The Bill does not show that the plaintiffs have any vested right to the competitive tonnage which is alleged will be diverted by these defendants and, therefore, fails to show that they will suffer any damage whatever in the future.

Wherefore and for divers other good reasons of objection appear- [fols. 78-80] ing upon the face of said Bill, these defendants pray the judgment of this honorable court whether they shall be compelled to make further or any answer to said Bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

Robert J. Cary, Edward T. Glennon, Bertrand Walker, Sidney C. Murray, Solicitors for the Defendants the New York Central Railroad Company, the Chicago River and Indiana Railroad Company.

[File endorsement omitted.]

[fol. 81] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

GENERAL AND SPECIAL MOTION OF THE CHICAGO JUNCTION RAILWAY COMPANY TO DISMISS—Filed May 8, 1923

Now comes The Chicago Junction Railway Company, defendant in the above entitled cause, by Silas H. Strawn and Ralph M. Shaw, its solicitors, and moves that plaintiffs' bill of complaint filed in this cause be dismissed because said bill does not state any matter of equity entitling plaintiffs, or any or either of them, to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiffs, or any or either of them, to any relief against this defendant. In [fol. 82] support of said motion this defendant assigns the following further reasons why said motion should be granted.

1. The bill of complaint filed by the complainants is multifarious in that it is simultaneously a bill of complaint alleged to have been brought under the Urgent Deficiency Appropriations Act approved October 22nd, 1913, against the United States and is also a bill which upon its face is a bill seeking general equitable relief against this defendant.

2. It appears from the face of said bill that this court has neither jurisdiction of the subject matter in said bill contained nor of this defendant.

3. It does not appear by plaintiffs' bill that they, or any or either of them, had any such legal, equitable or other interest in the subject matter thereof or in the transactions, acts, matters or things alleged in said bill to have been performed or done by this defendant as will entitle it to maintain said bill or to obtain the relief, or any part thereof, prayed for in said bill.

4. Said bill fails to show that any right at law or equity of plaintiffs, or any or either of them, has or will be violated.

5. Said bill does not allege facts sufficient in law to show that plaintiffs, or any or either of them, have been or will be damaged by reason of the acts, transactions, matters or things alleged to have been done by this defendant.

6. Said bill does not aver that from the date of the entry of said order of the Interstate Commission, namely May 16th, 1922, to the date of the filing of said bill of complaint, the plaintiffs have suffered any damage whatsoever. Said bill should be dismissed because said bill does not aver that the plaintiffs have any vested right to the competitive tonnage which it is alleged will be diverted by this [fol. 83] defendant and, therefore, said bill fails to show that they will suffer any litigable damage whatever in the future.

7. If plaintiffs, or any or either of them, ever had any valid cause of action in equity as alleged in their bill of complaint, the same has long since been barred by the laches of said plaintiffs and their long dealing in the premises and that, therefore, it would be contrary to equity and good conscience to take cognizance thereof.

8. Plaintiffs are improperly joined because it appears from said bill that their alleged causes of action are several and not joint within the meaning of Federal Equity Rule 26.

9. There is no provision in paragraphs 18 to 20 of section 1 of the Act to Regulate Commerce, nor in paragraph 2 of section 5 of said Act, nor any other provision of said Act which requires this defendant to file with the Interstate Commerce Commission a petition for authority and/or to obtain a certificate of public convenience and necessity in respect of the matters or things referred to in paragraphs IV and XI of said bill of complaint.

10. There is nothing in paragraphs 18 to 20 of section 1 of the Act to Regulate Commerce, nor in paragraph 2, section 5 of said Act, nor any other provision of said Act which requires this defendant to obtain either the authority of / or a certificate of convenience and necessity from the Interstate Commerce Commission before leasing or otherwise disposing of its railway or railway properties, or doing any of the acts alleged in said bill of complaint to have been done by it.

11. And this defendant, The Chicago Junction Railway Company, further moves specially that each and every prayer for discovery contained in paragraph XII, pages 18 and 19 of said bill of [fol. 84] complaint, should, as to it, be dismissed for the reason that as to it, plaintiffs or any or either of them are not entitled to the several discoveries prayed for.

12. And this defendant, The Chicago Junction Railway Company, further moves specially that as to it the following portions of the bill pertaining to the relief prayed for by plaintiffs be dismissed:

(A) "And plaintiffs further pray that a preliminary or interlocutory order or injunction be entered" (Page 19 of bill) * * *

"6. Setting aside and declaring null and void and of no effect whatsoever the lease by the Junction of its properties to the River Road; and

7. Restraining the River Road, its officers, attorneys, agents, employes and servants.

(a) from controlling and directing, or attempting to control and direct, by any method or means whatsoever, the operation of the Junction Road;

(b) from exercising, or attempting to exercise, any rights or privileges as a lessee of said property." (Page 20 of bill.)

8. Directing that the control of the railroad property o fthe Jun tion be restored to the Chicago Junction Railway Company un the final determination of this cause;

(B) and that upon the final hearing herein a decree be entere (Page 21 of bill.)

"14. Setting aside, and declaring null and void and of no effe whatsoever, the lease by the Junction of its properties to the Riv Road; and

15. Restraining the River Road, its officers, attorneys, agent employes and servants

(a) from controlling and directing, or attempting to control an direct, by any method or means whatsoever, the operation of th Junction Road;

[fols. 85–87] (b) from exercising, or attempting to exercise, an rights or privileges as a lessee of said property; and

16. Directing that the control of the railroad properties of th Junction be restored to the Chicago Junction Railway Company.

"And your plaintiffs further pray, * * * for such other and further orders or decrees as may be necessary to set aside said order of the Commission and to require the defendants and each of them to vacate, annul, and set aside any and all action which may have been taken under and by reason of said order of the Commission and to take such action as may be necessary to restore the parties and properties affected by said order, to the status of May 15, 1922; * * *

And as ground for said motion this defendant says that plaintiffs suit is brought pursuant to the provisions of the Urgent Deficiencies Appropriations Act approved October 22, 1913, (38 Stat. L., 219, 220) and that under said Act this court has no jurisdiction to grant the relief sought.

Wherefore, and for divers other good reasons of objection appearing upon the face of said bill, this defendant prays the judgment of this honorable court whether it shall be compelled to make further or any answer to said bill, and it respectfully prays to be hence dismissed with its reasonable costs in this behalf sustained.

Silas H. Strawn, Ralph M. Shaw, Solicitors for the Chicago Junction Railway Company. Guy Currier, Of Counsel.

[File endorsement omitted.]

[fol. 88] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

GENERAL AND SPECIAL MOTION OF THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY AND RICHARD FITZGERALD TO DISMISS—Filed May 8, 1923

Now come The Chicago Junction Railways Company and Union Stock Yards Company and Richard Fitzgerald, and each of them, defendants in the above entitled cause, by Silas H. Strawn and Ralph M. Shaw, their solicitors, and move that plaintiffs' bill of complaint filed in this cause be dismissed because said bill does not state any matter of equity entitling plaintiffs, or any or either of them, to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiffs, or any or either of them, to any relief against these defendants, or either of them.

[fol. 89] In support of said motion these defendants and each of them assign the following further reasons why said motion should be granted:

1. The bill of complaint filed by the complainants is multifarious in that it is simultaneously a bill of complaint alleged to have been brought under the Urgent Deficiency Appropriation Act approved October 22, 1913, against the United States and is also a bill which upon its face is a bill seeking general equitable relief against these defendants.

2. It appears from the face of said bill that this court has neither jurisdiction of the subject matter in said bill contained nor of these defendants, or either of them.

3. It does not appear by plaintiffs' bill that they or any or either of them had any such legal, equitable or other interest in the subject matter thereof or in the transactions, acts, matters or things alleged in said bill to have been performed or done by these defendants as will entitle them, or any or either of them, to maintain said bill or to obtain the relief, or any part thereof, prayed for in said bill.

4. Said bill fails to show that any right at law or equity of plaintiffs, or of any or either of them has or will be violated.

5. Said bill does not allege facts sufficient in law to show that plaintiffs, or any or either of them, have been or will be damaged by reason of the acts, transactions, matters or things alleged to have been done by these defendants.

6. Said bill does not aver that from the date of the entry of said order of the Interstate Commerce Commission, namely, May 16, 1922, to the date of the filing of said bill of complaint, the plaintiffs have suffered any damage whatsoever. Said bill should be dismissed because said bill does not aver that the plaintiffs have any vested right

to the competitive tonnage which it is alleged will be diverted by these defendants and therefore said bill fails to show that they will suffer any litigable damage whatever in the future.

[fol. 90] 7. If plaintiffs, or any or either of them, ever had any valid cause of action in equity as alleged in their bill of complaint, the same has long since been barred by the laches of said plaintiffs and their long dealing in the premises and that, therefore, it would be contrary to equity and good conscience to take cognizance thereof.

8. Plaintiffs are improperly joined because it appears from said bill that their alleged causes of action are several and not joint within the meaning of Federal Equity Rule 26.

9. There is no provision in paragraphs 18 to 20 of section 1 of the Act to Regulate Commerce, nor in paragraph 2 of section 5 of said Act, nor any other provision of said Act which requires these defendants to file with the Interstate Commerce a petition for authority and/or to obtain a certificate of public convenience and necessity in respect of the matters or things referred to in paragraphs IV and XI of said bill of complaint.

10. There is nothing in paragraphs 18 to 20 of section 1 of the Act to Regulate Commerce, nor in paragraph 2, section 5 of said Act, nor any other provision of said Act which requires these defendants, or either of them, to obtain either the authority of/or a certificate of convenience and necessity from the Interstate Commerce Commission before selling or otherwise disposing of their shares of capital stock of The Chicago River & Indiana Railroad Company or doing any of the acts alleged in said bill of complaint to have been done by them or either of them.

11. These defendants, The Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald, and each of them, further move specially that each and every prayer for discovery contained in paragraph XII, pages 18 and 19 of said bill of complaint should, as to them, and each of them, be dismissed for the reason that as to them, and for each of them, plaintiffs are not entitled to the several discoveries prayed for.

12. And the defendants, The Chicago Junction Railways and [fol. 91] Union Stock Yards Company and Richard Fitzgerald, and each of them, further move specially that as to them, and each of them, the following portions of the bill pertaining to the relief prayed for by plaintiffs be dismissed:

(A) "And plaintiffs further pray that a preliminary or interlocutory order or injunction be entered

1. Setting aside the sale of the capital stock of the River Road by the Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald to the Central; and" (Page 19 of bill) * * *

"5. Directing that the officers and directors of the River Road in office immediately prior to the acquisition by the Central of the

capital stock of the River Road be restored to their respective offices, rights and privileges, until the final determination of this cause; and" * * *

7. Restraining the River Road, its officers, attorneys, agents, employes and servants

(a) from controlling and directing, or attempting to control and direct, by any method or means whatsoever, the operation of the Junction Road;

(b) from exercising, or attempting to exercise, any rights or privileges as a lessee of said property;" (Page 20 of bill).

(B) "and that upon final hearing herein a decree be entered

9. Setting aside and declaring null and void and of no effect whatsoever the said sale of the capital stock of the River Road by the Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald to the Central; and * * *

13. Directing that the officers and directors of the River Road in office immediately prior to the acquisition by the Central of the capital stock of the River Road be restored to their respective offices, rights and privileges; and" (Page 21 of bill) * * *

15. Restraining the River Road, its officers, attorneys, agents, employes and servants

(a) from controlling and directing, or attempting to control and direct, by any method or means whatsoever, the operation of the Junction Road;

(b) from exercising, or attempting to exercise, any rights or privileges as a lessee of said property; and" * * *

(C) "Your plaintiffs further pray, * * * for such other and further orders or decrees as may be necessary to set aside said order of the Commission and to require the defendants and each of them to vacate, annul and set aside any and all action which may have [fol. 92] been taken under and by reason of said order of the Commission and to take such action as may be necessary to restore the parties and properties affected by said order to the status of May 15th, 1922;" * * * (Page 22 of bill).

And as ground for said motion these defendants say that plaintiffs' suit is brought pursuant to the provisions of the Urgent Deficiency Appropriations Act approved October 22, 1913 (13 Stat. L., 219-220) and that under said Act this court has no jurisdiction to grant the relief sought.

Wherefore, and for divers other good reasons of objection appearing upon the face of said bill, these defendants, and each of them, pray the judgment of this honorable court whether they shall be compelled to make further or any answer to said bill, and they re-

spectfully pray to be hence dismissed with their reasonable costs in this behalf sustained.

S. H. Strawn. Ralph M. Shaw, Solicitors for the Chicago Junction Railways & Union Stock Yards Company. Guy Currier, Of Counsel.

[File endorsement omitted.]

[fols. 93 & 94] [File endorsement omitted.]

[fols. 95-97] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

PETITION OF INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed May 4, 1923

To the Honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, I hereby enter the appearance of the Interstate Commerce Commission, as a party defendant, in the above-entitled suit, and of myself as its counsel.

P. J. Farrell, For Interstate Commerce Commission.

[File endorsement omitted.]

[fol. 98] [Title omitted]

[File endorsement omitted.]

[fol. 99] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed May 4, 1923

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I. Answering Paragraphs I to V, inclusive, of the bill of complaint, said intervening defendant, Interstate Commerce Commis-
[fol. 100] sion, hereinafter called the Commission, admits, for the purposes of this suit, that the allegations contained in said paragraphs are true.

II. Answering Paragraphs VI to XII, inclusive of the bill of complaint, the Commission admits and alleges that it made and entered the report and the order, dated May 16, 1922, referred to in Paragraph VIII of the bill of complaint, copies of which are attached to and made a part of the bill of complaint as Exhibit 1, in a proceeding then pending before it, wherein the New York Central Railroad Company, the Chicago River & Indiana Railroad Company, the Chicago Junction Railway Company, and the plaintiffs herein, appeared and were represented by their respective counsel, under authority conferred upon the Commission by the interstate commerce act, and that paragraph (2) of section 5 of said act reads as follows:

Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall
[fol. 101] have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

The Commission further alleges that in connection with the subject matters covered by said order, it accorded to all interested parties, including plaintiffs herein, a full and fair opportunity to be heard, in public hearings which were held in Chicago, Ill., and in Washington, D. C., prior to said May 16; that at said hearings a large volume of testimony and other evidence bearing upon said matters was submitted to the Commission for consideration on behalf of said parties, including the plaintiffs herein, by their respective counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination, on behalf of said parties by their counsel, whereupon, the Commission determined said matters and made and entered, said report and said order of May 16, which included the Commission's decision, conclusions, order and requirements, in the premises; that upon the evidence aforesaid, and as shown in and by said report and order of May 16, the Commission made the findings, stated the conclusions, and prescribed the rules and regulations and terms and conditions, upon which said order of May 16 is based.

[fol. 102] The Commission further alleges that in said report of

May 16 the New York Central Railroad Company was called the "Central"; that the Chicago River & Indiana Railroad Company was called the "River Road"; that the Chicago Junction Railway Company was called the "Junction"; and that in said report the Commission, among other things, said:

Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest.

The Commission further alleges that said findings, conclusions, rules and regulations, and terms and conditions were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the Commission in said proceeding as aforesaid.

The Commission further alleges that, in making said report and said order of May 16, it considered and weighed carefully, in the light of its own knowledge and experience, every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including all matters covered by the allegations of the bill of complaint herein, particularly the allegations contained in Paragraphs VI to XII, inclusive, of said bill of complaint.

The Commission further allages that said order of May 16 was [fol. 103] not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order it did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the Commission denies each of and all the allegations to the contrary contained in said bill of complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said bill of complaint, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and said order of May 16, 1922, which are hereby referred to and made a part of this answer.

All of which matters and things the Commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said bill of complaint be dismissed.

Interstate Commerce Commission, By P. J. Farrell, Chief Counsel.

Jurat showing the foregoing was duly sworn to by Mark W. Potter omitted in printing.

[fols. 104 & 105] [File endorsement omitted.]

[fol. 106] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

MOTION FOR LEAVE TO AMEND BILL OF COMPLAINT—Filed June 28, 1923

Now come the plaintiffs in the above entitled cause, by their solicitors, Luther M. Walter, John S. Burchmore and Nuel D. Belnap, and move the Court for leave to amend the bill of complaint herein by adding to Paragraph IV, page 6 of the Bill of Complaint the following:

"A certified copy of said application and of the Return to Questionnaire filed by the said Central with the Commission is attached hereto and marked Exhibits 3 and 4 and made a part hereof and"

by striking out the first paragraph of Paragraph XII, pages 16 and 17 of the printed bill of complaint, and inserting in lieu thereof the following:

"Plaintiffs further show that the River Road and the Junction, on May 15, 1922, were, and prior to that date always had been, neutral belt railroads uncontrolled by any trunk line carrier and as such were used by all railroads entering Chicago, impartially and without discrimination; that prior to May 16, 1922, the plaintiffs herein competed for traffic originating at points of origin on, or destined to points of delivery on, the said River Road and the Junction on equal terms with the Central without either the plaintiffs or the Central having any advantage in the securing of said traffic by reason of having an ownership or control of the said River Road and/or the said Junction; that the acquisition of control approved and authorized by the Commission in its order of May 16, 1922, substitutes monopoly of control and operation for the neutral control and operatin of the Junction and River Roads which prior to May 16, 1922, served alike all railroads reaching Chicago, including the plaintiffs herein and the Central; that practically all of the tonnage originating at or destined to points on the Junction and the River Roads is competitive tonnage in that the same could be hauled either over the lines of railroad constituent parts of the New York Central System or over the lines of one or more of your plaintiffs; that the control of a belt line by one line-haul carrier gives that line-haul carrier substantial advantages in the securing of competitive tonnage to the consequent disadvantage of competing line-haul carriers not having such control; that in cases where the shippers on the River Road and the Junction have failed to direct the route of movement of their shipments consigned to points which are served by the Central or by lines of railroad constituent parts of the New York Central System, directly or through its or their connections, as well as by the plaintiffs herein, directly

[fols. 107 & 108] or by their connections, it is and since May 16, 1922 has been the practice of the officials, agents and employes of the River Road and the Junction to route said shipments via the line of the Central and via the lines of carriers constituent parts of the New York Central System to the exclusion of routing any of said shipments via the lines of the plaintiffs herein; that the acquisition of control approved and authorized by the Commission in its said order has curtailed, and so long as it continues to exist, will, greatly curtail the ability of the plaintiffs to secure the competitive traffic of shippers located upon the lines of the Junction and the River Road for the reason that subsequent to May 16, 1922, it has been, now is, and will be, the practice of shippers located on the said railroads to give preference to cars of the Central, (which, under the order complained of, has the control of the said Roads) to the exclusion of cars of the plaintiffs, its competitors, and to route their shipments via the line of the Central and via the lines of railroad constituent parts of the New York Central System in lieu of routing said shipments via the lines of the plaintiffs herein; that the diversion of tonnage from the rails of the plaintiffs to the rails of the Central or other routes of the New York Central System, consequent upon the facts above related has resulted in a large loss of traffic and of revenue to the plaintiffs, to their irreparable loss and injury, in an amount exceeding $10,000,000.00; and that the loss in net earnings to plaintiffs which will result from the continued control acquired under the said order of the Commission will approximate $10,000,000.00 per annum so long as said control continues."

Luther M. Walter, John S. Burchmore, Xuel D. Behap.

Jurat showing the above was duly sworn to by F. W. Rosser omitted in printing.

[File endorsement omitted.]

[fols. 109 & 110] EXHIBIT 3 TO BILL OF COMPLAINT—Filed June 28, 1923

Interstate Commerce Commission

Washington

Secretary's Certificate omitted in printing.

[File endorsement omitted.]

[fol. 111] BEFORE THE INTERSTATE COMMERCE COMMISSION

In re Application of THE NEW YORK CENTRAL RAILROAD COMPANY for authority and for a certificate of public convenience evidencing the Commission's approval in respect of the following (*a*) the purchase by the New York Central Railroad Company of all of the capital stock of the Chicago River and Indiana Railroad Company; (*b*) the leasing by the Chicago Junction Railway Company for a term of ninety-nine years and thereafter at the election of the lessee in perpetuity of all its properties (owned and leased) to the Chicago River and Indiana Railroad Company; (*c*) the granting to the New York Central Railroad Company of an option to purchase all of the capital stock of the Chicago Junction Railway Company or all of the properties to be leased by it to the Chicago River and Indiana Railroad Company; all pursuant to the provisions of paragraphs 18 to 22 inclusive of section 1 and of paragraph 2 of section 5 of the interstate commerce act.

To the Interstate Commerce Commission:

The petition of The New York Central Railroad Company respectfully represents:

1. That the name and address of your petitioner are: The New York Central Railroad Company; Principal Office, Grand Central Terminal, New York, New York.

That the name and address of your petitioner's President are: [fol. 112] Alfred H. Smith, Grand Central Terminal, New York, New York.

That the name and address of your petitioner's Secretary are: E. F. Stephenson, Grand Central Terminal, New York, New York.

That the name and address of your petitioner's principal Attorney are: Robert J. Cary, Grand Central Terminal, New York, New York.

2. The making and filing of this application has been duly approved at a meeting of the Executive Committee (having full corporate authority in the premises) of the Board of Directors of your petitioner held on the 28th day of July, 1920, and the President, Vice-President, Auditor, Comptroller or other executive officer having knowledge of the matters herein set forth has been duly designated and authorized by your petitioner to make and file this application.

3. Your petitioner hereby makes application for authority and for a certificate of public convenience and necessity pursuant to the provisions of the Interstate Commerce Act in respect of the following:

(1) To enter into an agreement with The Chicago Junction Railways and Union Stock Yards Company providing:

(a) That The New York Central Railroad Company shall pu
chase for the sum of $750,000, to be paid in cash or in such secu
[fol. 113] ties as the Vendor and Vendee shall agree upon, all
the capital stock of The Chicago River and Indiana Railroad Co
pany;

(b) That The Chicago Junction Railway Company shall lea
at an annual rental of $2,000,000, payable in quarterly installmen
of $500,000 each at the expiration of each quarter year during th
term, except that the first two installments shall be for the su
of $250,000 each, for a term of Ninety-nine (99) years, and ther
after at the election of the Lessee in perpetuity, to The Chicago Riv
and Indiana Railroad Company all of its properties of every kin
and character, including those held by it in lease under a certai
indenture dated December 1, 1913, made between The Union Stoc
Yard and Transit Company of Chicago, as Lessor, and said Th
Chicago Junction Railway Company, as Lessee, and supplement
thereto.

(c) That The New York Central Railroad Company be grante
an option, to be exercised during the term of said lease, to purchas
either from The Chicago Junction Railways and Union Stock Yard
Company, a New Jersey corporation, all of the capital stock of sai
The Chicago Junction Railway Company for the sum of $22,987
516, to be paid in cash or in such securities as the Vendor an
Vendee shall agree upon, or to purchase from the respective owner
thereof all of the properties of every kind and character and th
reversionary interests therein of respectively The Chicago Junc
tion Railway Company and The Union Stock Yard and Transi
Company of Chicago, to be leased pursuant to the agreement fo
which approval is herein sought, by The Chicago Junction Railway
Company to The Chicago River and Indiana Railroad Company, fo
the sum of $33,333,333, payable in cash or in such securities a
the Vendor and the Vendee shall agree upon, of which purchas
price $22,987,516 is to be paid to The Chicago Junction Railway
Company and $10,345,817 to The Union Stock Yard and Transi
Company of Chicago.

[fol. 114] (2) To each of the corporations above named, includ-
ing your petitioner, to execute all assignments, transfers, leases
deeds and other instruments and agreements necessary to make the
transfers, leases and conveyances in said agreement provided for.

4. The New York Central Railroad Company is a consolidated
corporation organized and existing under the Laws of the States of
New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois,
and it owns and operates as a common carrier engaged in interstate
commerce certain main lines of railroad, with various branches con-
necting therewith, extending from New York, in the State of New
York, to Chicago, in the State of Illinois.

It will be in the public interest, and the present or future public
convenience and necessity require, or will require, for the reasons

to be hereinafter specified, that it add to and enlarge, in the manner provided for in the certain agreement hereafter referred to and summarized, its terminals and terminal facilities located in the City of Chicago.

The Chicago River and Indiana Railroad Company is a corporation organized and existing under the Laws of the State of Illinois; it owns and operates certain lines of railroad, with various branches, spurs, extensions, yards and other appurtenances, located in the City of Chicago, in and adjacent to the so-called Stock Yards District in said City, beginning at a point at or near the intersection of West 39th Street and Western Avenue in said City and extending thence in a southeasterly and southerly direction to West 49th Street; thence westerly along the north line of West 49th Street to [fol. 115] St. Louis Avenue in said City. Said lines of railroad connect with and said railroad company also has certain trackage rights over the railroad of the Indiana Harbor Belt Railroad Company, a corporation organized and existing under the Laws of the State of Indiana, and operating a so-called outer belt line in the Gary District in Indiana and in and about the City of Chicago, which said last named railroad company, The New York Central Railroad Company, in conjunction with certain other railroad companies, controls by ownership of all of its capital stock.

The Chicago Junction Railway Company is a corporation organized and existing under the Laws of the State of Illinois and owns and operates certain lines of railroad, with various branches, located in and adjacent to said Stock Yards District in said City of Chicago, which lines of railroad connect with the railroads of The Chicago River and Indiana Railroad Company and of The New York Central Railroad Company.

The Union Stock Yard and Transit Company of Chicago is a corporation organized under a special act of the Illinois Legislature dated February 13th, 1865, granting it, pursuant to authority of the then existing constitution of the State of Illinois, special charter powers. Under the provisions of its charter it had power, among other things, to locate, construct and maintain yards, structures and railroad lines, tracks and facilities for the handling of and transfer of live stock and dead and undressed animals at or passing through or near Chicago, and for the business of a general union stock yards with power to enlarge and change these yards [fol. 116] and facilities. It was also given power to construct, own and operate lines of railroad connecting with the lines of other railroad companies so as to afford facility for the transportation of live stock and other freight property of every kind to and from its yards, and to perform thereupon the services of a common carrier.

Said The Union Stock Yard and Transit Company of Chicago now owns and operates, and has so done hitherto for a long period of years, certain stock yards located in the Stock Yards District in the City of Chicago, and it has heretofore constructed and now owns certain lines of railroad and railroad tracks extending from a connection with the tracks of The Illinois Central Railroad Company at or near the shore of Lake Michigan and 43rd Street, in

the City of Chicago, and thence in a general westerly and northwesterly direction to a terminus in Section 19, Township 39 North Range 14, East of the third principal Merid-an in said City of Chicago, together with various side tracks, industrial tracks, switches turnouts, crossovers, appurtenances, railroad yards, yard tracks storage yards and tracks, repair tracks, roundhouse tracks, machine shop tracks and other railroad improvements and appurtenances By a certain indenture of lease made and entered into on the first day of December, A. D., 1913, by and between said The Union Stock Yard and Transit Company of Chicago and said The Chicago Junction Railway Company, and by certain supplements thereto all of the above described railroad properties together with certain easements and trackage rights, were granted, demised and leased in perpetuity to The Chicago Junction Railway Company and are now [fol. 117] operated by said last named company in conjunction with and as a part of the railroad properties owned by it.

The Chicago Junction Railways and Union Stock Yards Company is a corporation organized and existing under the Laws of the State of New Jersey; it owns all of the capital stock of The Union Stock Yard and Transit Company of Chicago; also all of the capital stock of The Chicago Junction Railway Company and 50% of the capital stock of The Chicago River and Indiana Railroad Company, the remaining 50% thereof being owned by certain individuals who wish to join with The Chicago Junction Railways and Union Stock Yards Company in selling and conveying to The New York Central Railroad Company, under the conditions and circumstances hereafter stated, all of said capital stock of The Chicago River and Indiana Railroad Company. The Chicago Junction Railways and Union Stock Yards Company has pledged all of said shares of stock of The Chicago Junction Railway Company so owned by it under and subject to the terms and provisions of a certain Mortgage and Deed of Trust dated April 10, 1900, made by said The Chicago Junction Railways and Union Stock Yards Company to The Standard Trust Company of New York, Trustee, to which Guaranty Trust Company of New York is Successor in Trust.

5. The Chicago Junction Railways and Union Stock Yards Company, as first party, and The New York Central Railroad Company, as second party, have made a certain agreement dated September 27th, 1920, a copy of which, marked Exhibit "1", is hereto attached and made a part of this application, the provisions of which are all [fol. 118] executory in character, which agreement stipulates that it and the arrangements therein contemplated to be made shall not be binding unless approved pursuant to law by the Interstate Commerce Commission and by such other public authorities, State or Federal, as may have jurisdiction in the premises.

If this Commission shall approve and authorize and shall issue a certificate of public convenience and necessity pursuant to law the parties to said agreement intend to bind themselves thereby as follows:

(1) The Chicago Junction Railways and Union Stock Yards Company will sell, transfer and deliver and will cause to be sold, transferred and delivered to The New York Central Railroad Company or its nominee free and clear of all liens the entire outstanding capital stock of said The Chicago River and Indiana Railroad Company, being 5,000 shares of the par value of $100 each, for the sum of $750,000.; said purchase price to be paid in cash or in such securities as the Vendor and Vendee shall agree upon. Before the purchase price thus provided for shall be paid by The New York Central Railroad Company to The Chicago Junction Railways and Union Stock Yards Company said latter company is to make showing satisfactory to counsel for the railroad company and shall guarantee that the railroad properties and appurtenances of The Chicago River and Indiana Railroad Company are free and clear of all liens and other obligations and all liabilities except the certain lien evidenced by the certain Trust Deed dated October 1, 1911, made by The Chicago River and Indiana Railroad Company to The Merchants Loan and Trust Company, Trustee, and the supplemental indenture thereto, dated July 1, 1915, made between the same parties, and the debt secured thereby evidenced by a certain issue of bonds with current interest thereon of The Chicago River and Indiana Railroad [fol. 119] Company of which there are now outstanding in the aggregate bonds amounting to $765,000, and, except as to sundry liens and obligations specified in a certain Exhibit "A" attached to said proposed agreement.

(2) Simultaneously with the delivery of said stock of The Chicago River and Indiana Railroad Company to The New York Central Railroad Company the parties to said agreement will cause The Chicago Junction Railway Company and The Chicago River and Indiana Railroad Company to enter into a lease whereby all of the railroad properties and appurtenances owned by The Chicago Junction Railway Company and also all the certain properties leased to it particularly described in a certain lease dated December 1, 1913, made between The Union Stock Yard and Transit Company of Chicago, as Lessor, and The Chicago Junction Railway Company, as Lessee, and leases supplementary thereto, will be leased to The Chicago River and Indiana Railroad Company; such lease is to be made for a term of ninety-nine (99) years and is to be renewable in perpetuity thereafter at the option of the Lessee. The Lessee is to pay an annual rental of $2,000,000., payable in quarterly installments, at the expiration of each quarter year during the term, except that the first two installments are to be $250,000. each instead of $500,000., and the Lessee is to deduct from the quarterly installments of rent as above specified to be reserved in said lease pro rata amounts sufficient to aggregate annually $620,749., being the annual amount of rent, reserved under said lease dated December 1, 1913, and supplements thereto, and to pay the same direct to the Lessor thereunder, namely, The Union Stock Yard and Transit Company of Chicago. Certain provisions are contained in said proposed agreement requiring the Lessee under said proposed lease to pay all taxes upon the

demised premises, giving it certain rights of user in respect of the properties of The Union Stock Yard and Transit Company of Chicago not subject to the said lease of December 1, 1913, and supple-
[fol. 120] ments thereto, providing, as between Lessor and Lessee, for the observance of certain obligations relating to appurtenant trackage agreements, easements and licenses and protecting the leasehold titles of the proposed Lessee, for the details of which your petitioner respectfully asks that reference be had to the copy of said proposed agreement hereto attached.

(3) During the term of the proposed lease The New York Central Railroad Company shall have the right to purchase from The Chicago Junction Railways and Union Stock Yards Company the entire capital stock now outstanding and issued of The Chicago Junction Railway Company, being 55,000 shares of the par value of $100. each, whenever such stock can be released from the said Mortgage and Deed of Trust and supplemental indenture thereto, made by the proposed Vendor thereof to The Standard Trust Company of New York, Trustee, Guaranty Trust Company of New York, Successor in Trust. The purchase price to be paid for said stock is $22,987,516, and is to be paid in cash or in such securities as the Vendor and Vendee shall agree upon. Upon the exercise of said option the transfer of said stock is to be made to the proposed Vendee or to its nominee and the proposed Vendor will then make showing to the satisfaction of counsel for the Vendee and will covenant that said stock and the properties and appurtenances (owned and leased) of The Chicago Junction Railway Company are free and clear of all liens and encumbrances except as specified in a certain Exhibit "B" attached to the said proposed agreement. If The New York Central Railroad Company, upon becoming the owner of said capital stock shall determine that the lease of The Chicago Junction Railway Company properties to be made to The Chicago River and Indiana Railroad Company shall be cancelled, then The New York Central Railroad Company shall become obligated to pay the rents and perform all of the obligations of the lease between The Union Stock Yard and Transit Company of Chicago and The Chicago Junction Railway Company dated December 1, 1913, and the leases supplemental thereto.

[fol. 121] (4) The New York Central Railroad Company is to have the right to purchase at any time all of the franchises, lands, leaseholds, trackage rights, equipment and all other railroad properties and appurtenances owned by the Chicago Junction Railway Company, and also all the properties leased to such latter company by The Union Stock Yard and Transit Company of Chicago under the lease dated December 1, 1913, and leases supplemental thereto, and now operated by it, for the sum of $33,333,333., payable in cash or in such securities as may be agreed upon. The Chicago Junction Railways and Union Stock Yards Company covenants that at the time of said sale and purchase the properties to be so conveyed shall be free and clear of all liens, encumbrances and other liabilities except such as are specified in Exhibit "B" attached to said proposed agreement, or

shall hereafter be created or placed upon the same by The New York Central Railroad Company, or with its consent in writing, and if, at the time of the conveyance of said properties, any liens, encumbrances or other obligations shall exist upon the same except as specified above the amount thereof shall be deducted from the purchase price provided for. Of said purchase price The New York Central Railroad Company shall pay $22,987,516, to The Chicago Junction Railway Company and $10,345,817, to The Union Stock Yard and Transit Company of Chicago.

The Chicago Junction Railways and Union Stock Yards Company is to see to it that all of the engagements to be performed under said proposed contract by it, by The Chicago Junction Railway Company and by The Union Stock Yard and Transit Company of Chicago shall be fully and effectively carried out, and The New York Central Railroad Company guarantees the performance by the proposed Lessee, The Chicago River and Indiana Railroad Company, of all the covenants to be undertaken by it in said proposed lease of the premises and properties of The Chicago Junction Railway Company, including its leasehold interests.

[fol. 122] For a detailed statement of each of the above stated proposed transactions your petitioner makes reference to said Exhibit "1" hereto attached and made a part hereof.

6. On the 28th day of July, 1920, the Executive Committee (having full corporate authority in the premises) of the Board of Directors of The New York Central Railroad Company adopted a certain resolution, a copy of which, marked Exhibit "2" is hereto attached and made a part hereof, sanctioning and approving the several proposed transactions hereinbefore recited and authorizing its proper officers to execute an agreement for the consummation of the same substantially in the form of the proposed agreement hereto attached and markd Exhibit "1," and further providing that said agreement and the provisions thereof are to be effective only when the same shall have been approved and authorized pursuant to law by order of the Interstate Commerce Commission and of such other governmental bodies, if any, as may have jurisdiction in the premises. On the 21st day of July, 1920, the Board of Directors of The Chicago Junction Railways and Union Stock Yards Company adopted a resolution of like character, a copy of which, marked Exhibit "3" is hereto attached, and made a part hereof.

7. Your petitioner makes the following statement of the reasons relied upon by it showing that it will be in the public interest and that the present or future public convenience and necessity require or will require that the assignments, transfers, leases, options and conveyances provided for in said proposed agreement set forth in Exhibit "1" hereto attached be consummated as therein provided for:

[fol. 123] (a) All of the above described railroad properties of The Chicago River and Indiana Railroad Company, The Chicago Junction

Railway Company and The Union Stock Yard and Transit Company of Chicago make an integral whole in railroad operation. Taken together they provide in the centre of one of the largest industrial districts of said City a network of railroad tracks, yards and railroad facilities serving not only said stock yards in the matter of transportation of live stock but a vast industrial territory engaged in a great variety of commercial pursuits, and by their connections with the lines of many other railroads entering the City of Chicago, including said Indiana Harbor Belt Railroad and The New York Central Lines, they afford the means of transporting freight of every class and character to and from said Stock Yards District and industrial territory from and to all parts of the United States.

(b) The New York Central Lines operating at Chicago, including therein The New York Central Railroad Company, The Michigan Central Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and the Indiana Harbor Belt Railroad Company, vitally need, in order to serve the shipping public, additional downtown terminals in the City of Chicago, which can best be developed by the acquisition, in the manner in this petition described, of the properties (owned and leased) of The Chicago Junction Railway Company and of The Chicago River and Indiana Railroad Company. It is impossible to promote or build such terminal facilities in a developed community to serve an already existing business district; first, because the industries and plants of shippers come into existence only because of the existence of railroad facilities; and second, because where in a developed community an established business district already exists the pre-emption of real estate and the scale of real estate values, the private and public improvements, the highways and other urban developments would all render railroad promotion and construction prohibitive. Thus a [fol. 124] terminal property must necessarily be constructed before and not after industrial development takes place in the territory which it serves.

A prime factor in measuring, in such case, the value of a going concern is the impossibility of its duplication. The original promoters of such an enterprise invariably carry the project through a long losing period until eventually industrial development brings a profitable volume of traffic. A good will thus realized and the adaptation of the railroad to its environment gives to its properties a greatly added value.

The stock yards group of railroads herein referred to has not only developed, by virtue of its long existence, a dense industrial territory tributary to its lines but the factor of value thus given to its properties has been also immeasurably augmented by a strategic element of location caused by the growth of the City of Chicago for many miles to the south, southwest and southeast of the territory so developed by such railroads.

The Chicago territory tributary to the lines operated by The Chicago Junction Railway Company and The Chicago River and Indiana Railroad Company lies in the heart of Chicago industrial

development and is an instance of a community developed to the highest degree as an established business district.

This territory divides naturally into five groups:

(1) Stock Yards and Packing Town
(2) Central Manufacturing District
(3) North to 15th Street
(4) East to Lake Michigan
(5) Southwest to Central Park Avenue

The Stock Yards and Packing Town section includes the stock yards and the plants of the packers, the main entrance to which is located at West 39th Street and Halsted Street in the City of Chicago. This [fol. 125] business was started in 1865 and there is now invested in it and its appurtenant industries from $250,000,000, to $350,000,000, and employment is given to some 50,000 people.

The Central Manufacturing District comprises approximately 500 acres of land, with valuable improvements and buildings, located in the most important industrial territory of Chicago. It has been under development for about fifteen years. It industries number 180 and the estimated value of its improvements is $50,000,000. The tonnage produced from industries in the District now runs over 100,000 carloads of freight per year and 100,000 tons per year of less-than-carload freight.

The Central Manufacturing District is located in the exact geographical centre of Chicago and is within two miles of the population centre of Chicago. Within a radius of four miles is located a population exceeding 1,250,000 people. At the present date nearly $15,000,000. has been invested in lands and buildings. There is vacant property upon which it is estimated that not less than 500 additional industries can be located, and these industries should produce yearly additional freight shipments amounting to from 200,000 to 300,000 cars.

The portion of the line of The Chicago Junction Railway extending North to 15th Street reaches a highly developed industrial section which is constantly growing. This development has been anticipated and encouraged by the establishment of the Union Junction Freight Station at 15th Street and Western Avenue.

The portion of the railway extending from the stock yards to Lake Michigan runs through a section that was formerly residential, but which is now becoming more and more industrial through encouragement given by The Chicago Junction Railway Company, and many important industries have been located along this line within the last few years.

[fol. 126] From Ashland Avenue to Western Avenue on 39th Street, and west of Western Avenue to Central Park Avenue, a distance of one and a half miles along 49th Street, is a rapidly developing industrial territory. East of Western Avenue room is still available for 75 to 80 additional industries and west of Western Avenue is territory in which industrial development will soon be pushed.

In this same section, the so-called Kenwood Manufacturing District, an organization owned and controlled by Pittsburgh and New

York interests has already located a number of important concer and is developing its property along the same lines as the develo ment in the other District.

The railroad lines operated by the Chicago Junction Railway Co pany and The Chicago River and Indiana Railroad Company hav in respect of the five groups of industrial territory above described, continuity of right of way and facilities united with a good will d veloped by a reciprocal relationship through a long period of yea between these two companies and all industries served by them, th value of all of which cannot be measured today upon a reproductio cost. Because of conditions existing in the City of Chicago, the properties could not now be physically reproduced at any price, an they have a value far in excess of any cost of reproduction.

(c) To unite in operation the stock yards group of railroads wit The New York Central connecting line facility, namely, the Indian Harbor Belt Railroad and with the other railroad lines under the co trol of The New York Central group would promote the public in terest to a high degree.

The Indiana Harbor Belt Railroad is located for the greater par out of Chicago and is not well adapted in itself to handle the busines of Chicago proper. On the other hand, the stock yards group of rail roads is "bottled up," so to speak, within the center of the Chicago In dustrial territory.

[fol. 127] These respective railroad facilities are thus complement each of the other and not competitors in public service. Each lack important facilities which the other has and which neither coul secure for itself. Handled together co-operatively they will create a complete terminal unit, which will serve all the industrial territor tributary to each with higher efficiency and will develop each such territory in an accelerated degree.

In the instance of the stock yards group located in the heart o Chicago, track expansion is most difficult if not impossible. On the other hand, in the instance of the Indiana Harbor Belt Railroad located beyond the limits of the City, unlimited railroad facilities can be developed.

This outer circle of railroads and its New York Central Lines con nections reaches the inner network of railroads by what is known as the Stock Yards Line of the Indiana Harbor Belt Railroad, which connects with The Chicago River and Indiana Railroad at Elsdon, again with that railroad and with The Chicago Junction Railway at 49th and Oakley Streets and again with such latter Railway Line at 49th and Morgan Streets. This connecting link is now a double track railroad and is used only to about 25% of its capacity. With the assistance of The Chicago River and Indiana Railroad it can be expanded into a four track railroad for its entire length, thus permitting unlimited traffic between the two groups.

By virtue of the connection thus to be developed the industries and shippers and the connecting railroads reached by the outer line would have a greater and more expeditious use of the less-than-carload facilities and of the Chicago delivery facilities afforded by the stock yards group.

On the other hand the vast number of industries and shippers served by the stock yards group would gain materially by having thrown open to them the use of all of the terminal facilities of the outer [fol. 128] group, namely, the Indiana Harbor Belt Railroad and other New York Central Lines and the use for railroad development of the territory contiguous to such railroads.

For example, when restricted track facilities of the stock yards group make it necessary freight cars can be brought via the Indiana Harbor Belt Railroad connecting link above described to classification yards located upon the Indiana Harbor Belt Railroad and there classified into trains for distribution according to the stock yard railroad group districts, of which there are now twelve. Trains so made up would then move from such outer classification yards direct to each of the twelve districts of the stock yards group of railroads. Such method of handling traffic would avoid congestion upon the lines of the stock yards group and would thus expedite in a high degree the movement of traffic to the great advantage of all shippers and consignees.

Conversely a relief so obtained for the stock yards group of railroads would enable such railroads to group and load on their own lines other cars with greater efficiency and speed and thereby to perform terminal services which would save further handling of such cars upon the lines of the Indiana Harbor Belt Railroad and in turn expedite thereon car movement and service.

The connecting line above referred to between the Indiana Harbor Belt Railroad and the stock yards group is very little used by the Indiana Harbor Belt Line, but under co-operative management this connecting line would become a valuable and material addition to the stock yards group of railroads in what is known as "internal circulation."

As heretofore stated large areas of territory in the Central Manufacturing District are available for industrial development, but the stock yards group of railroads will soon reach a limit in the congested [fol. 129] territory in which they are operated and be unable to provide proper expansion to handle the increased traffic thus to be developed.

To unite these properties in a common operation with those represented by The New York Central Lines will afford relief in the above respect by giving instant access to a large field of outside terminals.

(d) The trunk lines of the New York Central group having termini at Chicago are The New York Central Railroad Company, The Michigan Central Railroad Company and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company. The first thereof enters Chicago over its own right of way and rails; the second as a tenant in perpetuity of the Illinois Central Railroad Company under an agreement dated June 14, 1871; and the third by means of a traffic agreement dated June 24, 1886, made between the Illinois Central Railroad Company and the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, predecessor of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. These rail-

road lines extend east, northeast, southeast and south from Chicago, and with their branches and controlled connections serve a great territory in the United States and Canada, including a large portion of the Atlantic Seaboard.

The terminal facilities in the City of Chicago of the above named trunk lines are not only wholly inadequate to properly care for traffic which now moves over their lines to and from Chicago commercial territory and through the Chicago gateway, but are so limited in capacity as to impede or prevent the natural flow over their lines of a large amount of freight now moving to destination either at Chicago or elsewhere over circuitous routes.

(1) The New York Central Railroad in entering Chicago extends from the Indiana-Illinois State line to Englewood, a distance [fol. 130] of approximately six and one-half miles, and from thence to the La Salle Station, a distance of approximately seven miles. Between the State line and Englewood its right of way is one hundred feet in width and its rails are elevated. For this entire distance it is paralleled on the south and for the greater part contiguously by the railroad of the Pennsylvania Company. From Englewood to the La Salle Station the New York Central Railroad is located on a right of way one hundred feet in width, owned jointly by it and The Chicago, Rock Island and Pacific Railway Company, and divided between these two companies, for purposes of operation, by a practical arrangement, into two contiguous rights of way of fifty feet in width each.

The entire right of way as above described of the New York Central Railroad is bounded, as above outlined, by the railroad of the Pennsylvania Company and by the Rock Island Railroad on the one side and by Clark Street, Armour Avenue and South Chicago Avenue, which are important thoroughfares, on the other side; thus no opportunity exists for further terminal or industrial development.

Terminal facilities of a limited and inadequate character, and acquired, for the greater part, many years ago are located at several points on the right of way above described of the New York Central Railroad.

The New York Central Railroad has a direct connection with the Chicago Junction Railway at 40th Street, in Chicago, and under an agreement dated October 31st, 1907, made between the Indiana Harbor Belt Railroad Company and the Chicago, Indiana and Southern Railroad Company, predecessor of The New York Central Railroad Company, the latter company possesses for a term of ninety-nine years operating rights over the Indiana Harbor Belt Railroad, and it thus has opportunity for direct connection with the Chicago Junction Railway at a point near the Stock Yards.

[fol. 131] (2) The Michigan Central Railroad connects with the Illinois Central Railroad at Kensington, which is located thirteen miles from the centre of Chicago and in its outlying districts on the south. From that point The Michigan Central Railroad Company operates into the City of Chicago over the Illinois Central Railroad. The Illinois Central right of way in uptown Chicago passes through

a territory which is almost entirely an established residential district. Its right of way in downtown territory is located along the Lake front and is adjacent to the most congested and the highest class retail business district of the City, in which there is little or no room for further terminal or industrial development.

Under the above mentioned agreement the Illinois Central Railroad Company is under no obligation to develop or add to its terminal facilities or to encourge the development of industrial territory for the particular needs or advantage of The Michigan Central Railroad Company. At Kensington The Michigan Central Railroad has certain terminal facilities capable of reasonable expansion. In the downtown section of Chicago it has the so-called South Water Street Freight House facilities and certain Illinois Central team tracks set apart for its use. Its only opportunity for development in this territory is in the use, with the consent of the Illinois Central Railroad Company, of existing Illinois Central terminal facilities.

The Michigan Central Railroad has a direct connection at 40th Street, in Chicago, with the Chicago Junction Railway, and under an agreement made between the Indiana Harbor Belt Railroad Company and The Michigan Central Railroad Company the latter also has the right to use the Indiana Harbor Belt Railroad for through trains in and out of the Chicago Stock Yards.

(3) The Cleveland, Cincinnati, Chicago and St. Louis Railway [fol. 132] Company (hereinafter referred to as the "Big Four Company") obtains traffic access to Chicago under the agreement dated June 24, 1886, above referred to, which establishes over the rails of the parties thereto, connecting at Kankakee, a through and exclusive traffic route between Cincinnati and Chicago. The Big Four Company has at present in the City of Chicago no owned industrial connections or terminal facilities, and for its traffic in and out of Chicago it is dependent upon the Illinois Central Railroad Company, acting pursuant to the terms of said Traffic Agreement of June 24, 1886.

The development and enlargement of the terminal facilities of The New York Central Railroad Company, of The Michigan Central Railroad Company and of the Indiana Harbor Belt Railroad Company in the manner herein proposed would be of undoubted advantage to the Big Four Company in routing over its lines much traffic naturally destined to the same and now moving by circuitous routes.

By adding the Chicago Junction Railway properties as terminals appurtenant to the above named New York Central trunk lines the reciprocal effect would be produced, of providing, on the one hand, for said carriers, greatly increased capacity and efficiency for delivering, receiving and developing traffic and, on the other hand, for shippers and consignees of freight, better service and additional direct routes in the transportation of the same.

(e) In the foregoing has been developed by reason of continuity of location, connections and good will the great value of the stock-yards group of railroads, and the reciprocal benefit that would accrue

to the shipping public and the New York Central group of railroads by adding to the same the stock yards group as terminals.

The factors above stated together with the reproduction cost of the properties of The Chicago River and Indiana Railroad Company [fol. 133] and of the Chicago Junction Railway Company (owned and leased) justify the stipulated purchase price of $75,000 for the stock of The Chicago River and Indiana Railroad Company; the annual rental reserved of $2,000,000 for the leasing of the properties (owned and leased) of The Chicago Junction Railway Company; the stipulated purchase price of $22,987,516 for the capital stock of The Chicago Junction Railway Company; and the stipulated purchase price of $33,333,333 for all of the properties (owned or leased) of The Chicago Junction Railway Company to be leased to The Chicago River and Indiana Railroad Company.

In support of the above allegations your petitioner represents that it has caused an examination to be made by experts into the value of the railroad properties and appurtenances of The Chicago River and Indiana Railroad Company, and your petitioner is informed by them and believes that the cost of reproducing at the present time said railroad properties would exceed $3,000,000. The funded unmatured debt of said Company is $891,428.57, and thus on the basis of value above specified an equity exists in said railroad properties amounting at least to $2,108,000.

Your petitioner further represents that it has likewise caused an examination to be made by experts into the value of the railroad properties and appurtenances (owned and leased) of The Chicago Junction Railway Company proposed to be leased under the provisions of said agreement dated September 27th, 1920, to said The Chicago River and Indiana Railroad Company, and your petitioner is informed by them and believes that the cost of reproducing at the present time said railroad properties and appurtenances, if they could be reproduced, would exceed the sum of $33,333,333 representing the capitalization at 6% of the annual rental of $2,000,000 proposed to be paid therefor, and also designated as the purchase price of said properties in the event that The New York Central Railroad Company shall hereafter exercise the option proposed to be given [fol. 134] to it to purchase the same.

Your petitioner further represents that at the hearing hereof it will offer in evidence statements in detail and opinions of experts in support of the allegations relating to values hereinbefore set forth.

Your petitioner respectfully prays that the Interstate Commerce Commission will approve and authorize the making of said proposed agreement between The Chicago Junction Railways and Union Stock Yards Company and The New York Central Railroad Company in manner and form as set out in Exhibit "1" hereto attached, and will further approve and authorize the performance by the several corporations therein named of the respective undertakings to be assumed respectively by each, as therein provided for, and will issue in respect thereof its certificate of public convenience and necessity to the end that The New York Central Railroad Company may lawfully acquire all of the capital stock of The Chicago River and In-

diana Railroad Company; that all of the properties owned and now operated by The Chicago Junction Railway Company, including the certain premises and properties demised and leased to it under the certain lease dated December 1, 1913, and supplements thereto, may be leased for a term of ninety-nine (99) years and thereafter at the election of the Lessee in perpetuity to The Chicago River and Indiana Railroad Company; that The New York Central Railroad Company may have an option during the term of said lease to purchase all of the capital stock of The Chicago Junction Railway Company or to purchase all of the premises, railroad properties and appurte-[fol. 135] nances to be demised and leased to The Chicago River and Indiana Railroad Company, and that upon any exercise of said option or options by said The New York Central Railroad Company, proper deeds of assignment, transfer and conveyance may be made effectively conveying to it or to its nominee all of said railroad properties and appurtenances.

Your petitioner respectfully asks that this application be set down for hearing before this Commission on a day to be named by the Commission.

The New York Central Railroad Company, By A. H. Smith, President.

Jurat showing the above was duly sworn to by A. H. Smith omitted in printing.

[fol. 136] EXHIBIT 1 TO PETITION

This agreement made this 27th day of September, 1920, by and between The Chicago Junction Railways and Union Stock Yards Company, a corporation organized and existing under and by virtue of the Laws of the State of New Jersey (hereinafter called the Vendor) party of the first part, and The New York Central Railroad Company, a corporation organized and existing under the Laws, among other states, of the State of Illinois (hereinafter called the Vendee) party of the second part,

Witnesseth:

Whereas, the Vendor owns all of the capital stock of The Chicago Junction Railway Company, a corporation organized and existing under the Laws of the State of Illinois, owning and operating certain railroad lines in the County of Cook and State of Illinois and, also, all of the capital stock of The Union Stock Yard and Transit Company of Chicago, a corporation organized and existing under the Laws of the State of Illinois, owning, among other properties, certain railroad lines located in the County of Cook and State of Illinois, all of which shares of stock are pledged under and subject to the terms and provisions of a certain Mortgage and Deed of Trust dated April 10th, 1900, made by the Vendor to The Standard Trust Company of New York, Trustee, to which Guaranty Trust Company of New York is Successor in Trust; and

Whereas, the Vendor owns fifty (50) per cent and certain individuals own the remaining fifty (50) per cent of the capital stock of The Chicago River and Indiana Railroad Company, a corporation organized and existing under and by virtue of the Laws of the State of Illinois, owning and operating certain lines of railroad located in Cook County, Illinois, connecting with the lines of railroad of The Chicago Junction Railway Company; and

[fol. 137] Whereas, the Vendor desires that all of the capital stock of said The Chicago River and Indiana Railroad Company shall be sold and conveyed to the Vendee and the Vendee desires to purchase the same; and

Whereas, said individual stock-holders of said The Chicago River and Indiana Railroad Company are willing to sell and convey their stock-holding interests to the Vendee; and

Whereas, the Vendor also desires that the railroad properties and appurtenances of said The Chicago Junction Railway Company shall, in conjunction with the sale and conveyance of said capital stock of The Chicago River and Indiana Railroad Company, be leased either to said The Chicago River and Indiana Railroad Company or to the Vendee; and

Whereas, it will be in the public interest and to the mutual benefit of the parties hereto and of the several railroad companies herein referred to that the sales, conveyances and leases herein provided for shall be made upon the terms and provisions herein contained;

Now, therefore, in consideration of the premises it is agreed by and between the parties hereto as follows:

1. Within thirty (30) days after approval of this contract and of the several transactions herein contained by the Interstate Commerce Commission and such other public authorities as shall have jurisdiction in the premises the Vendor will sell, transfer and deliver and will cause to be sold, transferred and delivered to the Vendee or its nominee free and clear of all liens the entire outstanding capital stock of said The Chicago River and Indiana Railroad Company, being Five thousand (5,000) shares of the par value of one hundred dollars ($100.00) each, for the sum of seven hundred and fifty thousand dollars ($750,000.00), and the Vendee agrees [fol. 138] to purchase the same. The said seven hundred and fifty thousand dollars ($750,000.00) shall be paid in cash or in such securities as the Vendor and Vendee shall agree upon and simultaneously with the transfer and delivery of said stock to the Vendee or to its nominee.

The above contract of sale and purchase is made on and subject to the following conditions:

Before the purchase price herein provided for of said capital stock shall be paid by the Vendee the Vendor shall make showing satisfactory to Counsel of the Vendee and shall guarantee to the Vendee that the railroad properties and appurtenances of said The Chicago River and Indiana Railroad Company are free and clear of all liens encumbrances, debts, contract, trackage and leasehold obligations

and all other liabilities except the certain lien evidenced by the certain Trust Deed dated October 1, 1911, made by The Chicago River and Indiana Railroad Company to The Merchants Loan and Trust Company, Trustee, and the supplemental indenture thereto, dated July 1, 1915, made between the same parties and the debt secured thereby evidenced by certain issues of bonds with current interest thereon of The Chicago River and Indiana Railroad Company of which there are now outstanding in the aggregate bonds amounting to Seven hundred and Sixty-five Thousand Dollars ($765,000.00), and, except as specified in Exhibit "A," hereto attached, which is made a part of this agreement; provided that the Vendor will pay or cause to be paid by said The Chicago River and Indiana Railroad Company such portion of all taxes and assessments of every kind and character charged to said Railroad Company, or levied upon its properties, which shall have accrued at the time of the transfer of said stock or shall be levied for the calendar year in which it is made, and of interest upon its bonds and of all obligations specified in said Exhibit "A," as shall be equitably apportionable to the period preceding the date upon which said capital stock of said The Chicago [fol. 139] River and Indiana Railroad Company shall be transferred to the Vendee, to the end that the Vendee's interests in the properties of said The Chicago River and Indiana Railroad Company shall bear only their pro rata share of all such obligations.

The Vendor further covenants to protect and save the Vendee harmless from all claims, demands and liabilities of every kind and and character against The Chicago River and Indiana Railroad Company relating to its property or appurtenances other than such as may be based upon the mortgage and bonds above specified, or upon indebtedness, rentals or other obligations listed in said Exhibit "A" arising prior to the date upon which said capital stock of said The Chicago River and Indiana Railroad Company shall be conveyed to the Vendee, as herein provided for.

Any monies which said The Chicago River and Indiana Railroad Company may have on hand, or which may be due to it at the time of the transfer of said stock, shall be applied, so far as may be necessary, to the payment of any such debts, obligations or other liabilities other than that represented by the principal of the mortgage bonds above referred to.

The Vendor, at the option of the Vendee, to be exercised prior to or simultaneously with the delivery of said stock of The Chicago River and Indiana Railroad Company, will cause said The Chicago River and Indiana Railroad Company to enter into a lease with said The Chicago Junction Railway Company whereby all of the railroad properties and appurtenances owned by said last mentioned Railway Company and, also, all the certain properties leased to it, particularly described in the certain lease dated December 1, 1913, wherein said The Union Stock Yard and Transit Company of Chicago is Lessor and said The Chicago Junction Railway Company is Lessee, and leases supplementary thereto, and which are now operated by it, will be demised and leased to said The Chicago River and Indiana Railroad Company. Such proposed lease shall be in form approved by

[fol. 140] Counsel for the Vendor and Vendee and shall be for a term of ninety-nine (99) years, and renewable in perpetuity thereafter at the option of the Lessee, beginning on the first day of the month following the date of approval of said lease by the Interstate Commerce Commission, at an annual rental of two million dollars ($2,000,000.00) payable in quarterly installments at the expiration of each quarter year during the term, except that the first two installments shall be for the sum of two hundred and fifty thousand dollars ($250,000.00) each instead of five hundred thousand dollars ($500,000.00) each, provided that the Lessee shall be entitled to deduct (and said lease shall so provide) from the quarterly installments of rent to be reserved in said lease, as herein provided, pro rata amounts sufficient to aggregate annually six hundred and twenty thousand, seven hundred and forty-nine dollars ($620,749.00), being the annual amount of rent reserved under said lease dated December 1, 1913, and supplements thereto, made between The Union Stock Yard and Transit Company of Chicago and The Chicago Junction Railway Company, and thereupon to pay direct to the Lessor thereunder, on behalf of The Chicago Junction Railway Company the installments of rent reserved therein as and when they shall fall due.

Said lease shall also provide that the Lessee therein shall pay all taxes and assessments, Federal, State, County and Municipal (except those personal to the Lessor), which are or may become liens on the leased property, provided that The Union Stock Yard and Transit Company of Chicago shall covenant to pay in the first instance all of said taxes (except special assessments identified with specific pieces of property) properly chargeable to the railroad properties and appurtenances leased by said Company to The Chicago Junction Railway Company under the terms of said lease dated December 1, 1913 and supplements thereto, with the understanding that said The Chi-[fol. 141] cago River and Indiana Railroad Company, as Lessee, upon proper bills rendered, shall reimburse said The Union Stock Yard and Transit Company of Chicago for the amount of all such taxes from time to time so paid by it. The taxes properly chargeable to said railroad properties and appurtenances shall be deemed to amount to 41% of the sum of all taxes (except special assessments and those personal to The Union Stock Yard and Transit Company of Chicago) from time to time assessed and levied upon all the properties of said Company, including said railroad properties and appurtenances demised under the terms of said lease dated December 1, 1913.

In the event that additions, betterments or alterations made either to the railroad properties and appurtenances demised under said lease of December 1, 1913, or to other properties of said The Union Stock Yard and Transit Company of Chicago shall make said ratio for dividing taxes inequitable as between said The Union Stock Yard and Transit Company of Chicago and said The Chicago River and Indiana Railroad Company, then upon request of either of said parties the same shall be revised to a ratio that shall equitably reflect the altered situation in relative values.

If, at any time during the term of said lease, either party to the

above arrangement providing for paying taxes shall regard the same as affecting its interests injuriously, then it shall have the right, upon serving sixty (60) days' notice in writing upon the other party, to terminate the same and thereafter the Lessee shall pay all taxes assessed and levied upon said railroad properties and appurtenances demised under said lease dated December 1, 1913.

Said lease shall further provide that the Lessee thereunder shall operate and maintain the properties leased during the term thereof, and as sub-lessee under said lease dated December 1, 1913, shall be entitled, in lieu of The Chicago Junction Railway Company, Lessee [fol. 142] thereunder, to enter upon, occupy and use the premises therein demised and to exercise all the rights and privileges therein granted, provided that in respect of the following grant therein contained to-wit:

"* * * the right to lay down, maintain and operate upon the lands of the Yards additional side tracks, switch tracks, industrial tracks, switches, connections, cross-overs, and appurtenances thereof, necessary to reach industrial plants now or hereafter erected; with the right to rearrange, remove, and replace existing yards, side tracks, switch tracks, industrial tracks, switches, connections, and cross-overs, and the same to change, alter and renew at pleasure and the right to erect such depots and stations as may be reasonable and necessary."

said Lessee shall exercise the same subject to approval by said The Union Stock Yard and Transit Company of Chicago as to location and plan for any such addition, improvement or rearrangement, to the end that the exercise thereof shall not interfere with the efficient and economical operation of the properties of said The Union Stock Yard and Transit Company of Chicago, as they now exist. The foregoing provision shall not be deemed to limit in any respect any right at any time existing in said Lessee to condemn or otherwise appropriate property for its purposes pursuant to law.

The Vendee will guarantee the performance by the Lessee, The Chicago River and Indiana Railroad Company, of all covenants undertaken by it in said lease contained, and to make effective this provision will, upon the execution of said lease, place its appropriate guarantee thereon, as herein provided.

Upon the making of said lease the Vendor shall make showing satisfactory to Counsel for the Vendee, and the Lessor shall covenant that the properties of said The Chicago Junction Railway Company [fol. 143] and of said The Union Stock Yard and Transit Company of Chicago, so to be leased, are owned by them respectively in fee simple, except as specified in Exhibit "B" hereto attached, and are free and clear from all liens, encumbrances, debts, contract, trackage and leasehold obligations and all other liabilities except as specified in said Exhibit "B," provided that the Vendor shall see to it and the Lessor shall covenant that it, the Lessor, will pay such portion of all taxes and assessments levied upon its properties which shall have accrued at the beginning of the term of said lease or shall be levied for the calendar year in which such term shall begin, and of all

obligations specified in said Exhibit "B," as shall be equitably apportionable to the period preceding the beginning of the term of said lease, to the end that the Lessee shall be charged with only its pro rata share of all such taxes and other obligations.

Said Lessor shall also covenant that during the term of said lease it will not, except as hereinafter provided, place upon said properties, or any portion thereof, any lien or encumbrance of any kind or character, and the Vendor, as the owner of all of the capital stock of said The Chicago Junction Railway Company and of said The Union Stock Yard and Transit Company of Chicago, hereby agrees that it will not vote said stock or any portion thereof, at any stockholders' meeting or take any other action in furtherance of any such purpose.

Any monies which said The Chicago Junction Railway Company may have on hand, or which may be due to it at the time of the making of said lease, shall be applied, so far as may be necessary, to the payment of any such debts, obligations or other liabilities.

The Vendor covenants that it will not sell, assign or transfer, except to the Vendee, as hereinafter provided, the stock, or any portion thereof, of said The Chicago Junction Railway Company during the term of said lease, or of any extension thereof, that during said period [fol. 144] it will not by affirmative vote or by abstaining from voting or in any other manner, directly or indirectly, sanction or permit any increase of said capital stock, and that it will not pledge, mortgage or otherwise encumber the same except subject to the right of purchase thereof by the Vendee, as hereinafter provided, and that if there shall be any lien upon said stock or any other obligation against the same at the time that said right of purchase shall be exercised then, that the amount thereof shall be deducted from said purchase price; that said The Chicago Junction Railway Company shall not incur any indebtedness, obligation or other liability of any kind or character during the term of said lease without the consent of the Vendee, and that if, with the Vendee's consent, such indebtedness, obligation or other liability shall be incurred, the amount thereof existing or outstanding at the time the Vendee shall exercise its right to purchase the stock of said The Chicago Junction Railway Company as hereinafter provided, may be deduced from the purchase price thereof.

If the Vendee shall elect that a lease as aforesaid shall not be made between said The Chicago River and Indiana Railroad Company and said The Chicago Junction Railway Company, then the Vendee hereby covenants and agrees that at the time of the conveyance and delivery to it of the capital stock of The Chicago River and Indiana Railroad Company and of the payment of the purchase price by it, as hereinbefore provided, the Vendee will enter into a lease with The Chicago Junction Railway Company for the properties aforesaid upon the same terms, conditions and covenants as above provided for the lease proposed to be made between said The Chicago River and Indiana Railroad Company and said The Chicago Junction Railway Company.

Either of the leases aforesaid shall be subject to all of the terms

and conditions of the said lease made as aforesaid between said The Union Stock Yard and Transit Company of Chicago and said The [fol. 145] Chicago Junction Railway Company, dated December 1, 1913, and the supplements thereto, except as herein otherwise provided.

2. The Vendee shall have the right during the term of the lease herein provided for, and of any extension thereof, to purchase from the Vendor the entire capital stock now issued and outstanding of said The Chicago Junction Railway Company, being Fifty-five thousand (55,000) shares of the par value of One Hundred Dollars ($100.00) each, and now pledged under said Mortgage and Deed of Trust and Supplemental Indenture thereto, made by the Vendor to The Standard Trust Company of New York, Trustee, Guaranty Trust Company of New York, Successor in Trust, whenever said stock can be released from said Mortgage and Supplemental Indenture thereto and the Vendee, if and when it exercises its right to acquire said stock shall pay therefor the sum of twenty-two million, nine hundred and eighty-seven thousand, five hundred and sixteen dollars ($22,987,516.00).

The said purchase price shall be paid in cash or in such securities as the Vendor and Vendee shall agree upon, and at the time of the sale and transfer of said stock to the Vendee or its nominee the Vendor will make showing to the satisfaction of Counsel of the Vendee and will covenant that said stock and the properties and appurtenances of said The Chicago Junction Railway Company are free and clear of all liens and encumbrances except as specified in Exhibit "B," hereto attached, or created as herein provided.

If the Vendee upon becoming the owner of the capital stock of The Chicago Junction Railway Company shall determine that the said lease of its properties to be made as herein provided to The Chicago River and Indiana Railroad Company, or to the Vendee, shall be cancelled, then the Vendee shall thereupon become obligated to pay the rents and perform all of the conditions of the lease between [fol. 146] The Union Stock Yard and Transit Company of Chicago and The Chicago Junction Railway Company, made as aforesaid, dated December 1, 1913, and of the leases supplemental thereto except as herein otherwise provided.

3. The Vendee or its nominee shall also have the right, at any time, to purchase all of the franchises, lands, leaseholds, trackage rights, equipment and all other railroad properties and appurtenances owned by said The Chicago Junction Railway Company and, also, all the properties leased to it by said The Union Stock Yard and Transit Company of Chicago under its said lease dated December 1, 1913, and leases supplemental thereto, and now operated by it, for the sum of thirty-three million, three hundred and thirty-three thousand, three hundred and thirty-three dollars ($33,333,333), payable in cash or in such securities as the Vendor and the Vendee shall agree upon, and the Vendor covenants that upon the exercise by the Vendee of the right of purchase herein provided for it will cause The Chicago Junction Railway Company and The Union Stock Yard and

Transit Company of Chicago to execute and to deliver to the Vendee or to its nominee such deeds and other instruments as will effectively convey all the properties and interests above described to be so purchased by the Vendee.

The Vendor further covenants that the properties so to be conveyed shall be free and clear of all liens, encumbrances and other liabilities except such as are specified in Exhibit "B" hereto attached, or shall hereafter be created or placed upon the same by the Vendee or with its consent in writing, and if, at the time of the conveyance of said properties, any liens, encumbrances or other obligations shall exist upon the same except as specified above the amount thereof shall be deducted from the purchase price herein provided for.

The Vendee shall, by covenants in such instruments of conveyance contained, assume and agree to perform all the obligations imposed [fol. 147] on either The Union Stock Yard and Transit Company of Chicago or The Chicago Junction Railway Company in respect of the properties so to be conveyed thereby by any of the instruments or items enumerated in said Exhibit "B," or hereafter incurred pursuant to the provisions of this agreement by either of said corporations in connection with the upkeep or operation of said properties or imposed either of said corporations by any ordinances (present or future) of the City of Chicago or other public body affecting or relating to said properties.

The Vendee shall pay of said purchase price twenty-two million, nine hundred and eighty-seven thousand, five hundred and sixteen dollars ($22,987,516.00) to The Chicago Junction Railway Company and ten million, three hundred and forty-five thousand, eight hundred and seventeen dollars ($10,345,817.00) to The Union Stock Yard and Transit Company of Chicago.

4. The Vendor, The Chicago Junction Railway Com-any and The Union Stock Yard and Transit Company of Chicago shall each, at the request of the Lessee under the lease herein provided for, take such corporate action from time to time as may be necessary or appropriate in the acquisition of property or in any other matters incident to the organization, maintenance or operation of the properties to be leased as in said lease herein provided, and the Vendor shall, as owner of all of the capital stock of The Chicago Junction Railway Company and of The Union Stock Yard and Transit Company of Chicago, see to it that all of the engagements hereunder to be performed by it, by The Chicago Junction Railway Company and by The Union Stock Yard and Transit Company of Chicago shall be fully and effectively carried out.

5. This agreement and the arrangements herein contemplated to be made shall not be binding unless approved pursuant to law by the Interstate Commerce Commission and by such other public authority, [fol. 148] State or Federal, as may have jurisdiction in the premises, and unless counsel for the Vendee shall approve all titles, leaseholds, grants and other rights and interests here involved.

The parties hereto, however, agree to use their best endeavors to obtain approval of the same by each and all public authorities. The

Vendee agrees to make application for such approval to the Interstate Commerce Commission and to such other public authorities as it may be advised are necessary prior to November 1, 1920.

Maps marked Exhibits "C," "D" and "E," identified and authenticated by the signatures of the respective Chief Engineers of the parties hereto, are made a part hereof, showing respectively the Railroad properties of The Chicago River and Indiana Railroad Company, The Chicago Junction Railway Company and the certain properties of The Union Stock Yard and Transit Company of Chicago, leased to The Chicago Junction Railway Company under the said lease dated December 1, 1913, and supplements thereto, and indicating, in respect of each of said railroad properties, by separate colors, properties held in fee, by lease, by trackage right, by easement and by any other form of user and the several portions of said respective railroads subject to lease, trackage right, easement and any other form of user.

It is agreed herein that the extent and the nature of the holdings, subject to the provisions of this agreement of said respective Railroad Companies, are substantially as shown upon said Exhibits "C," "D" and "E."

This agreement shall extend to and be binding upon the respective successors and assigns of the Vendor and Vendee.

If any items constituting obligations of either The Chicago River and Indiana Railroad Company or The Union Stock Yard and Transit Company of Chicago or The Chicago Junction Railway Company, or constituting liens or encumbrances on said properties, which [fols. 149 & 150] should properly have been included in said Exhibits "A" or "B," have been inadvertently omitted therefrom, they may nevertheless be hereafter inserted therein, and if any items which are included therein should not properly be there they may be hereafter omitted.

In witness whereof, the parties hereto have caused this agreement to be executed in their respective corporate names by their respective officers duly authorized and their respective corporate seals to be hereto affixed and attached by their respective secretaries the day and year first above written.

The Chicago Junction Railways and Union Stock Yards Company, By George P. Gardner, Vice-President. Attest: Martin A. Taylor, Secretary. [Corporate Seal.] The New York Central Railroad Company, By A. H. Smith, President. Attest: E. F. Stephenson, Secretary. [Corporate Seal.]

[fols. 151-153] Jurats showing the foregoing were duly sworn to by Martin A. Taylor and E. F. Stephenson omitted in printing.

[fol. 154] EXHIBIT "A" TO CONTRACT

A tabulation of all liens, encumbrances, debts, contract obligations, leasehold obligations, trackage obligations, and all other obli-

gations, relating to the railroad properties, and appurtenances of the Chicago River and Indiana Railroad Company—not including current operating expenses except those herein specified.

I

Funded Debt

(a) Bond issue of October 1, 1911, and supplemental agreement of July 1, 1915, with the Merchants Loan & Trust Company, Trustee Company, Trustee, covering an issue of $765,000.00 First Mortgage 5% Gold Bonds, maturing October 1, 1925.

II

Equipment Obligations

(a) Loan Price Agreement between the Chicago River & Indiana Railroad and Chicago Junction Railway, providing that the former will assume the payments for four (4) of the fourteen (14) locomotives allocated to the Chicago Junction Railway under the Equipment Trust Agreement between the Chicago Junction Railway Company, Director General of Railroads, and the Guaranty Trust Company of New York, Trustee, dated January 15, 1920. The total payment of this loan price aggregates a maximum of $126,428.57. This amount is payable in equal installments, due July 15, 1920, and semi-annually thereafter. The payment due July 15, 1920, has been paid by the Chicago River & Indiana Railroad Company.

(Here follow tables marked side folio pages 154½ and 155)

Leasehold and

Lessor	Lessee	Note	Date	Expir
Nessen Warehousing Co. ....C. R. & I. R. R..		(1)	Nov. 20, 1911	Dec. 31
Illinois Central R. R. .....C. R. & I. R. R..		(2)	Nov. 28, 1917	90 days
B. & O. C. T. R. R. .....C. R. & I. R. R..		(3)	Jan. 2, 1912	Jan. 2,
A. T. & S. F. Ry. .....C. R. & I. R. R..		(4)	Nov. 28, 1917	90 days

NOTE (1).—This is a sublease of a portion of the premises leased by the from the Sanitary District of Chicago under date of December 1, 1906.

NOTE (2).—This is a lease from the Santa Fe and Illinois Central, joint ov

NOTE (3).—This agreement is a renewal of an agreement made January 20 for 10 years from January 20, 1905, and was renewed for 99 years from Jan

NOTE (4).—This is the same lease as noted in Note 2.

[fol. 155]

Trackag

Grantor	Grantee	Date	Expiration	
A. T. & S. F. Railway..	C. R. & I. R. R...	Jan. 1, 1909	Dec. 31, 1933 and thereafter	$7,
C. J. Railway	C. R. & I. R. R...	Jan. 1, 1909	99 years.....	37
A. T. & S. F. Railway..	C. R. & I. R. R...	Jan. 1, 1913 (Supplemental Agreement to lease, dated January 1, 1909, first above enumerated.)	.....	$9'
P. C. C. & St. L.	C. R. & I. R. R...	Dec. 13, 1911	20 years.....	37
I. H. B. R. R.	C. R. & I. R. R...	Nov. 16, 1914	Aug. 20, 1986	W

Other

(a) Track Ordinance Easement City of Chicago to this company; no reco Street and alleys. See permit of October 6, 1909, granted by the City of Chicago

(b) Track Ordinance Easement City of Chicago to this company, dated Ap Avenue; ordinance issued to Chicago Refrigerator Car Company; this company

(c) Track Ordinance Easement City of Chicago to this company; no record across 48th Place and alleys.

(d) Track Ordinance Easement City of Chicago to this company, dated Ju Street; permit issued to Chicago Brick Company; this company assumes payme

NOTE.—The items mentioned in the foregoing subdivisions are shown conte

III

Leasehold and Easement Obligations

te	Date	Expiration	Annual Rental	Premises	Remarks
)	Nov. 20, 1911	Dec. 31, 1956	$5,162.50	Nessen Warehouse Property 37th and Robey Streets...	Lessee pays taxes. Area 14.75 acres .....
)	Nov. 28, 1917	90 days' notice	6.00	Land in Elevator Yard	90 days' cancellation either party. Area 405 sq. ft. Lessee pays taxes.
)	Jan. 2, 1912	Jan. 2, 2011	20.00	43rd and 49th Sts.	May cancel after expiration on 90 days' notice.
)	Nov. 28, 1917	90 days' notice	21.00	Land near Leavitt St. Yard..	.....

he premises leased by the Nessen Company through an Assignment from the Chicago Title & Trust Company December 1, 1906.
nd Illinois Central, joint owners.
greement made January 20, 1905, between the B. & O. R. R. and Union Stock Yards & Transit Co., which ran ved for 99 years from January 12, 1912.
te 2.

IV

Trackage Obligations

te	Expiration	Basis of Charge	Premises	Remarks
1909	Dec. 31, 1933 and thereafter	$7,500.00 per annum	Elevator Yard Tracks and Slip Property, 27th and Robey Sts.	Lessee pays taxes. 5-year cancellation notice after Dec. 31, 1933.
1909	99 years.....	$37\frac{1}{2}$ cents per car handled over line.		
1913	.....	$970.68 per annum.	Elevator Yard Tracks and Slip Property 27th and Robey St.	Lessee pays taxes. 5-year cancellation notice after Dec. 31, 1933.
plemental Agreement e. dated January 1, rst above enumerated.)				
1911	20 years.....	$37\frac{1}{2}$ cents per car handled over line.	South or west side of P. C. C. & St. L. tracks between Drainage Canal and 49th street connection with the B. & O. C. T.	Subject to cancellation 1-year notice either party, providing the P. C. C. & St. L. provides its own freight house facilities.
1914	Aug. 20, 1986	Wheelage	49th Street Line	No bill ever rendered and no charge paid: seldom used.

V

Other Obligations

to this company; no record of ordinance; no record of expiration; annual rental $244.00; tracks across 48th ted by the City of Chicago.
o this company, dated April 13, 1910; no record of expiration; annual rental $33.00; tracks across Kedzie r Company; this company assumes the payment.
o this company; no record of date of ordinance; no record of date of expiration; annual rental $198.98; tracks

o this company, dated June 10, 1910; expiration June 10, 1930; annual rental $118.00; tracks across 43rd is company assumes payment.
divisions are shown separately as a matter of convenience. Some of them are also included under subdivision

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Various Contracts, Agreements and Other Obligations Entered Into by the Chicago River & Indiana Railroad Company

Item No.	File No.	Date	With whom made	Remarks
1	3	Dec. 30, 1911	P. C. C. & St. L. Ry. Co.	Trackage rights.
2	4	Oct. 6, 1904	" " "	Crossing 47th St. Contract with C. J. Ry. Co.
3	5	Nov. 18, 1908	I. H. B. R. R. Co.	Trackage rights, main line.
4	5	Nov. 16, 1914	" "	Trackage rights, 49th St.
5	5	Nov. 16, 1914	" "	Trackage rights, Brighton Park.
6	8	Nov. 20, 1911	Nessen Warehousing Co.	Lease Sanitary District.
7	10	Aug. 8, 1912	Chicago Bearing Metal Co.	Track 45th St. and Western Ave.
8	12	Jan 1, 1909	A. T. & S. F. Ry. Co.	Lease Property 27th St. and the River.
9	13	Jan. 1, 1909	" " "	Trackage agreement.
10	15	July 1, 1912	Chicago Title & Trust Co.	Right of way west of P. C. C. & St. L. tracks.
11	16	Jan. 1, 1909	U. S. Y. & T. Co., et al	Trackage agreement.
12	18	July 1, 1912	A. G. Leonard	Track rights west of P. C. C. & St. L. Ry. Co.
13	23	June 25, 1910	Chicago City Ry. Co.	Crossing 49th St. and Kedzie Ave.
14	28	June 13, 1913	Ill. Northern R. R. Co.	Use of I. N. tracks 38th and 47th Sts.
15	39	Jan. 20, 1905	B. & O., B. & O. C. T. R. R. Co., et al	Trackage agreement.
16	40	Sept. 20, 1909	A. T. & S. F. Ry. Co.	Track connection, 49th St.
17	42	March 7, 1911	Brunswick, Balke, Collender Co.	Track, Western Ave. property.
18	45	Dec. 10, 1904	U. S. Y. & T. Co.	Construction of tracks.
19	50	May 10, 1905	C. J. Ry. Co.	Lease, Union Freight Station.
20	52	Oct. 21, 1913	B. & O. C. T. R. R. Co.	Letter re reaching Patent Vulcanite Roofing Co. via B. & O. C. T.
21	53	Jan. 17, 1905	" " "	Contract, C. J. Ry Co., Interlocking Plant.
22	54	Oct. 1, 1913	A. T. & S. F. Ry. Co., et al	Switch engine, Crane Co.'s plant.
23	62	Nov. 28, 1910	Lake Bldg. Material Co.	Construction, track at 49th and Leavitt Sts.
24	64	April 6, 1911	Canners Can Co. (Wilson Steel Products Co.)	Track, 49th and Western Ave.
25	72	Jan. 16, 1912	Brunswick, Balke, Collender Co.	Track, 45th and Western Ave.
26	79	Nov. 1, 1913	U. S. Y. & T. Co.	Lease, land occupied by Swift & Co.

Various Contracts, Agreements, Etc.—*Continued*

No.	No.	Date	With whom made	Remarks
27	101	March 18, 1916	G. T. System, et al	Gates, 49th St. and Kedzie Ave.
28	109	Oct. 3, 1916	Shane-Mason Co., Inc. (Assigned to Montana Flour Mills Co., October 1, 1919)	Lease at 27th and Robey.
29	112	June 20, 1916	City of Chicago	Crossing, 43rd St.
30	113	Nov. 1, 1916	I. H. B. R. R. Co.	Use I. H. B. rails, Oakley Ave. and Morgan St.
31	115	Jan. 20, 1916	B. & O. C. T. R. R. Co., et al	Crossing protection, 49th St.
32	123	July 24, 1917	I. H. B. R. R. Co.	Lamp, 49th and Kedzie Ave.
33	129	Nov. 28, 1917	A. T. & S. F. Ry. Co., et al	Lease, ground 31st and Leavitt Sts.
34	135	April 1, 1918	P. C. C. & St. L. Ry. Co.	Joint switching arrangement.
35	136	May 11, 1918	Jones & Laughlin Steel Co.	Driveway, 45th Pl. and Western Ave.
36	138	June 8, 1920	C. T. H. & S. E. Ry. Co.	Lease of C. R. & I. Engine No. 301.
37	148	April 15, 1919	Melville Clark Piano Company	Track, 48th Pl. and Kedzie Ave.
38	149	May 15, 1919	Central Lime & Cement Company	Track, 49th and Whipple Sts.
39	150	May 15, 1919	Union Insulating Co.	Track, 47th and Whipple Sts.
40	151	May 15, 1919	Cleveland Metal Products Company	Track, 43rd St. and Western Ave.
41	152	(Not executed)	Marshall Field & Co.	Track, 47th and Whipple Sts.
42	153	June 16, 1919	Jones & Laughlin Steel Co.	Track, 47th and Leavitt Sts.
43	154	Aug. 1919	Duffin Iron Co.	Track, 49th St. and Kedzie Ave.
44	157	Nov. 21, 1919	Amer. Fdy. & Equip. Co.	Track, 47th and Richmond Sts.
45	158	Jan. 2, 1919	Pere Marquette Ry. Co.	Sewer, 43rd and Leavitt Sts.
46	160	Dec. 1, 1919	Ideal Coated Paper Co.	Track, 43rd St. and Western Ave.
47	161	Dec. 15, 1919	Channel Chemical Co.	Track, 43rd St. and Western Ave.
48	163	Jan. 1, 1909	Chicago Surface Lines	Crossing, 47th and Leavitt Sts.
49	165	Feb. 15, 1920	F. T. Hoyt Co.	Track, 49th St. and Kedzie Ave.
50	169	April 1, 1920	Weber Storage & Distributing Co.	Rent, 27th and Robey Sts.

NOTE—This list does not include the various agreements with industries covering settlement of demurrage charges on average basis as per national demurrage rules.

Leaseh

Lessor	Lessee		Date	
B. & O. R. R.	C. J. Ry...	Jan.	1, 1917	J
(a) B. & O. R. R.	C. J. Ry...	March	12, 1913	3
Central Mfg. Distr.	C. J. Ry...	Dec.	1, 1913	F
(b) U. S. Y. & T. Co.	C. J. Ry...	Sept.	1, 1915	Y
U. S. Y. & T. Co.	C. J. Ry...	Oct.	1, 1916	P
U. S. Y. & T. Co.	C. J. Ry...	April	1, 1916	P
Swift & Company	C. J. Ry...	Feb.	1, 1917	Y
Canal Commission	C. J. Ry...	Jan.	29, 1910	J
Wabash R. R.	C. J. Ry...	March	1, 1916	D
Midland Whse. & Transfer Co.	C. J. Ry...	Nov.	1, 1915	Y
Midland Whse. & Transfer Co.	C. J. Ry...	March	1, 1917	N
Nat'l Wool Whse. & Stge. Co.	C. J. Ry...	May	1, 1916	A
(c) U. S. Y. & T. Co.	C. J. Ry...	Jan.	1, 1918	P
Central Mfg. Distr.	C. J. Ry...	Sept.	1, 1917	A
(d) U. S. Y. & T. Co.	C. J. Ry...	Dec.	1, 1913	P
C. R. & I. R. R.	C. J. Ry...	Jan.	1, 1909	99

NOTE.—Nos. (a) and (b) above have since been included in No. (c

ions

	Premises	Remarks
0	Rent of Foot Bridge.	90 days' cancellation. EITHER PARTY; no tax provision.
0	Land 43rd & Robey Sts.	Area .111 acres. Lessee pays taxes.
0	Right-of-way 35th to 39th Sts., Morgan St. to Ashland Ave.	Lessor pays taxes. Area 16.385 acres.
3	Land in Leavitt Street Yard.	1 yr. cancellation either party. Lessee pays taxes. Area 2.972 acres.
0	Land at 40th and Wallace Sts.	Lessee pays taxes. Area 1.2 acres.
2	Land at 39th and Racine Ave.	Area 57,161.15 sq. feet. Lessee pays taxes.
7	Land at 43rd and Robey Sts.	Area 6,820 square feet. Lessee pays taxes. 1 year notice either party.
)	Bridge rental over I. & M. Canal.	No cancellation or tax provisions.
)	Land at 33rd and Waterville St.	Area .764 acres. 60 days cancellation by lessor. No tax provision.
)	Freight platform 15th St. and Western Ave.	Area .262 acres. 60 days cancellation either party. Lessee pays taxes.
)	Freight Station Land 15th St. and Western Ave.	Approximately 160 sq. ft. No tax provision. At will.
)	Land at 43rd and Robey Sts.	Area 6,000 square feet. Lessee pays taxes. 6 months cancellation either party.
)	Land in addition to that leased under lease of December 1, 1913.	
)	Land west of Ashland Ave. to Western Ave., south of 39th St.	Area 19.029 acres. Lessee pays taxes.
)	Right-of-way from Lake Michigan and 42nd St. west along 40th St. to and through the Union Stock Yards, to Western Avenue, thence north to 14th Street.	

[fol. 157] EXHIBIT "B" TO CONTRACT

A tabulation of all liens, encumbrances, debts, contract obligations, trackage obligations, leasehold obligations, and all other obligations relating to the railroad properties, and appurtenances of the Chicago Junction Railway Company and to the railroad properties and appurtenances of the Union Stock Yard and Transit Company, in the possession of the Chicago Junction Railway Company, under lease or otherwise—not including current operating expenses, except those herein specified.

I

Funded Debt

(a) None.

II

Equipment Obligations

(a) Equipment Trust Agreement dated January 15, 1920, between the Chicago Junction Railway Company, Director General of Railroads, and Guaranty Trust Company of New York, Trustee, covering 14 locomotives allocated to this Company. The total maximum payment due under this agreement is $442,500.00, payable in 15 equal amounts, due July 15, 1920, and semi-annually thereafter until paid. The note due July 15, 1920, has been paid. The payment of 4 of these locomotives is assumed by the Chicago River & Indiana Railroad Company, details of which are shown in "Exhibit A" of the Chicago River & Indiana Railroad Company hereto attached.

(Here follows table marked side folio page 157½)

[fol. 158]

V

Other Obligations

(a) Track Ordinance Easement from City of Chicago to this Company dated August 5th, 1918, expiration October 5, 1934; annual rental, $420.00; track across public streets at 42nd and Lake Park Avenue; $10,000.00 bond to City.

(b) Track Ordinance Easement from City of Chicago to this Company dated February 5, 1916, expiration February 4, 1936; annual rental, $2,911.00, covering tracks in Robey Street from 43rd to 45th Street; $10,000.00 bond to City.

(c) Track Ordinance Easement from City of Chicago to this Company dated December 23, 1912, expiration December 23, 1932; an-

nual rental, $161.50; track in Benson Street; $10,000 bond to the City.

(d) Track Ordinance Easement from City of Chicago to this Company; no record of date or expiration; annual rental, $49.20; track at 15th Street and Western Avenue.

(e) Track Ordinance Easement City of Chicago to this Company dated April 14, 1911; no record of expiration; annual rental, $53.16; track across 43rd Street; track constructed in accordance with city ordinance passed February 20, 1911, page 3983 of City Council Proceedings.

(f) Track Ordinance Easement City of Chicago to Union Stock Yard & Transit Company, dated November 4, 1912; expiration November 4, 1932; annual rental, $61.00, of which this Company pays one-half. Track at Wentworth Avenue. $10,000.00 bond to the City.

(g) Agreement between the Sanitary District of Chicago and this Company, dated April 17, 1897, term of agreement indefinite; annual rental, $2,373.50. This amount represents 5% interest on bridge fund deposited by the Sanitary District of Chicago with this Company and used for maintenance purposes by this Company. This agreement amends a similar agreement dated November 14, 1895; the term of the agreement was for time necessary to build the bridge and continuance of maintenance thereof indefinitely thereafter.

(h) Agreement between the Union Stock Yard & Transit Company, Chicago Junction Railway, and Chicago Junction Railroad, dated September 6, 1903, and the supplemental agreement between the same parties, for the construction of the structure for the South Side Elevated Railroad. This agreement is inserted for the purpose of disclosing whatever interest or obligation the Chicago Junction may have in the agreement.

(NOTE.—The items mentioned in the foregoing subdivisions are shown separately as a matter of convenience. Some of them are also included under subdivision VI below.)

Various Contracts, Agreements and Other Obligations Entered Into by the Union Stock Yard and Transit Company or Chicago Junction Railway Company

Item No.	File No.	Date	With whom made	Remarks
1	493	Jan. 1, 1919	Anglo-American Prov. Co., et al	Viaduct.
2	48	Jan. 9, 1902	" " " "	Easement for pipes, 39th and Racine.
3	508	Mar. 1, 1920	" " " "	Lease of passageway.
4	49	Apr. 19, 1900	" " " "	Lease of passageway.
5	493	Jan. 1, 1920	" " " "	Viaduct permit.
6	62	July 10, 1902	" " " "	Viaduct permit and wires, Iron St.
7	256	Mar. 15, 1916	" " " "	Water and sewer lines.
8	62	Sept. 23, 1902	" " " "	Water and sewer lines and cooling tower.
9	476	July 1, 1919	" " " "	Permission for meter pit.
10	62	Feb. 10, 1903	" " " "	Permission for pipes.
11	382	Aug. 2, 1915	" " " "	Permission for post for anchorage.
12	105	Sept. 12, 1906	American Can Co.	Gates at 40th St. and Canal.
13	443	Oct. 2, 1916	" " "	Sewer easement.
14	134	Apr. 18, 1907	American Car Lines	Constr. track scale, 45th and Halsted.
15	81	Mar. 10, 1905	" " "	Construction of hot water heaters, 45th and Halsted Sts.
16	104	June 30, 1906	" " "	Location of car body, 47th & Packers Sts.
17	323	Apr. 8, 1913	" " "	Lease of land for shanty.
18	368	Oct. 25, 1914	" " "	Sewer easement, 45th St. (and suppl.).
19	65	Oct. 29, 1902	Armour & Co.	Sewer easement.
20	486	Jan. 1, 1919	" " "	Pipe lines.
21	177	May 31, 1917	" " "	Use of tracks.
22	472	Aug. 1, 1919	" " "	Water main.
23	73	Oct. 27, 1903	" " "	Exchange and use of tracks.
24	514	Apr. 27, 1920	" " "	Gas pipe, Racine Ave.
25	82	Jan. 1, 1905	" " "	Construction of tracks at 32nd St.
26	467	June 10, 1919	" " "	Construction of tracks.
27	56	Sept. 2, 1902	" " "	Construction of platform, 44th St.

Item No.	File No.	Date	With whom made	Remarks
28	76	Apr. 8, 1904	Armour & Co.	Gas pipe easement.
29	148	May 28, 1906	" " " , et al.	Construction of tracks.
30	201	May 1, 1908	" " " , et al.	Telephone conduit easement.
31	208	Jan. 2, 1909	" " "	Pipe line easement, 44th St.
32	266	Oct. 19, 1910	" " "	Sewer easement, 46th St.
33	157	Aug. 4, 1911	" " " , et al.	Permit for walk across tracks.
34	303	July 1, 1912	" " "	Location of track scales.
35	353	Feb. 4, 1914	" " "	Water pipe easement, 32nd St.
36	228	Feb. 4, 1910	" J. Ogden	Easement agreement.
37	380	July 1, 1915	" & Co.	Pipe line easement.
38	407	Sept. 15, 1916	" " " , et al.	Track extension.
39	425	June 1, 1917	" " "	Pipe line easement.
40	437	June 11, 1918	" " "	Water pipe easement.
41	451	Sept. 1, 1918	" " "	Construction of sewer.
42	491	Dec. 31, 1918	" " "	Lease of property, 45th and Halsted Sts.
43	457	Mar. 9, 1919	" " "	Sewer easement, 43rd Pl.
44	49	Dec. 7, 1917	" " " , et al.	Remodeling elevated span, 44th St.
45	231	Aug. 5, 1909	American District T. Co.	Conduit, Center Ave. Bridge.
46	314	Jan. 28, 1913	" " " "	A. D. T. service.
47	355	Dec. 11, 1913	" " " "	A. D. T. service.
48	355	Jan. 27, 1914	" " " "	A. D. T. service.
49	384	July 31, 1915	" " " "	Permit, Campbell Ave.
50	471	Aug. 1, 1919	" " " "	Attachment of cable.
51	295	June 1, 1912	Archer Iron Works	Right-of-way by incline.
52	353	Apr. 11, 1919	" " "	Lease, 34th St. and Campbell Ave.
53	93	June 1, 1904	" " "	Constr. platform, 34th and Campbell.
54	389	Nov. 1, 1915	Amalgamated Machinery Corporation	Right to run sewer.
55	497	Mar. 26, 1920	American Glue Co.	Construction of track.
x56	18	Apr. 21, 1895	" " "	Switching connections, Loomis St.
57	436	May 20, 1918	American Sand & Gravel Co.	Road crossing permit.
58	498	Apr. 16, 1920	American Window Cleaning Co.	Janitor service.

x59	31	Aug.	1, 1888	A., T. & S. F. Ry.	Property for tracks.
60	220	July	1, 1909	Atlas Locomotive Ash Pan	Construction and use of ash pans.
061	15	June	23, 1893	F. E. Ashton	Side track.
62	227	Sept.	13, 1909	Aurora, Elgin & Chicago R. R.	Lease of four gondolas.
63	329	June	24, 1913	" " " "	Use of gondola cars.

[fol. 160]

64	125	Dec.	31, 1906	Baltimore & Ohio R. R.	Union frt. station transfer agreement.
65	167	Jan.	2, 1912	" " " " "	Use of tracks.
66	363	May	1, 1914	" " " " "	Permit for pipe line, 14th st.
67	427	Jan.	1, 1917	" " " " "	Construction overhead bridge, 43rd St.
68	320	Mar.	12, 1913	" " " " "	Permit to construct track to frt. house.
69	211	Mar.	29, 1909	Berkshire Warehouse	Construction tracks, 46th St.
70	343	Dec.	15, 1915	R. W. Burns	Expense Maintenance of crossing.
71	326	May	26, 1913	Brotherhood of Locomotive Engineers	Rules and rates of pay.
72	479	Aug.	13, 1919	" " " "	Wage agreement.
73	374	Oct.	24, 1915	" " " "	Rules and rates of pay (and suppl.).
74	468	July	9, 1919	" " " "	Wage agreement.
75	377	May	11, 1915	" " " "	Wage agreement.
76	431	Dec.	1, 1917	" " " "	Wage agreement.
77	394	Nov.	1, 1915	Boilermakers & Helpers Union	Wage agreement (and supplement).
78	417	Feb.	12, 1917	Benevolent Assn. of Ry. Employees	Soliciting health and accident insurance
79	166	Apr.	29, 1903	Chicago Terminal & Transfer R. R.	Joint crossing expense with Ill. Nor.
80	24	Oct.	1, 1914	" " " " " "	Right-of-way for tracks.
x81	51	June	1, 1898	" " " " " "	Lease.
82	226	Sept.	11, 1909	" " " " " "	Flagman's services, 21st and 26th Sts.
83	94	Jan.	19, 1905	Commonwealth Electric Co.	Permit for poles.
84	247	May	31, 1910	" Edison Co.	Conduit, 35th St.
85	357	Mar.	18, 1914	" " "	Permit attaching conduits.
86	248	May	27, 1910	" " "	Guy straps.
87	359	May	1, 1914	" " "	Permit attaching conduits.
88	362	May	2, 1914	" " "	Permit to locate poles.
89	424	May	1, 1917	" " "	Conduits, 40th St.
90	109	Jan.	10, 1901	Chicago City Ry. Co.	Track at Egan Ave.
x91	35	Mar.	24, 1896	" " " "	Permit, poles, Wentworth Ave.

Item No.	File No.	Date	With whom made	Remarks
x92	20	Apr. 1, 1897	Chicago City Ry. Co.	Guy poles.
93	100	Aug. 14, 1901	" " " "	
94	168	Apr. 1, 1907	C. & N. W.	Permit, poles, Emerald Ave.
95	96	Dec. 3, 1904	" " " "	Bridge tenders' wages.
96	223	June 9, 1909	" " " "	Lease near Campbell Ave.
97	229	Sept. 20, 1909	" " " "	Ogden Ave viaduct.
x98	239	Feb. 1, 1910	" " " "	Ground, 15th St. and Western Ave.
99	172	Mar. 24, 1906	Chicago & Western Indiana R. R.	Elevation of tracks, 14th and Ogden.
100	35	Jan. 28, 1905	" " " " " " "	Track connection.
x101	2	Nov. 14, 1881	" " " " " " "	Track agreement.
102	268	Sept. 20, 1910	" " " " " " "	Track intersection, 39th St.
103	264	Sept. 20, 1910	" " " " " " "	Interlocking plant.
104	400	Oct. 26, 1916	" " " " " " "	Interlocking plant.
105	107	Sept. 15, 1906	" " " " " " "	Wrecking outfit agreement.
x106	22	July 14, 1885	City of Chicago	Track elevation and easement.
107	481	Oct. 25, 1910	" " "	Right-of-crossing, Ullman St.
x108	9	Jan. 30, 1892	" " "	Construction of track.
109	440	June 24, 1918	" " "	Ordinance for poles.
110	458	Aug. 5, 1918	" " "	Tracks, reduction plant.
111	423	Feb. 5, 1916	" " "	Switch track, 46th and Lake Park Ave.
112	277	Apr. 14, 1911	" " "	Re Robey St. tracks.
113	301	Apr. 19, 1912	" " "	43rd St. tracks.
114	311	Nov. 4, 1912	" " "	Ordinance, elevation tracks, 43rd to 49th.
115	316	Dec. 23, 1912	" " "	Ordinance, Wentworth Ave. bridge.
x116	14	Apr. 1, 1893	Carl Corper Brewing Co.	Track Benson Street.
x117	5	Mar. 9, 1881	Chicago and Grand Trunk R. R.	Constructing siding.
x118	4	Aug. 20, 1889	C. & A. R. R. et al.	Constructing railroad, 51st St.
119	160	Apr. 14, 1905	C. & A. R. R.	Crossing, Broad and Church Sts.
120	138	Nov. 1, 1906	Cole Manufacturing Co.	Maintaining box cars for inspectors.
121	225	Aug. 28, 1909	" " "	Permit for fence.
122	146	Aug. 7, 1906	Chicago Railway Equipment Co.	Switch track on Bross Ave.
				Building switch tracks.

123	19	Apr. 22, 1897	Crandall & Leavitt		Re 33rd St. side track.
124	171	May 29, 1906	C., B. & Q. R. R.		Telephone on 19th St.
125	219	Mar. 15, 1908	" " " " " "		Freight handling, Union Station.
126	259	July 14, 1910	" " " " " " et al		Separation of grades, 18th and 19th Sts.
127	260	July 14, 1910	" " " " " " et al		Separation of grades, 18th and 19th Sts.
128	286	Dec. 2, 1911	" " " " " " et al		Joint switch tenders, 26th and Campbell.
129	118	July 18, 1905	Chicago Great Western R. R.		Inspector's shanty at 45th St.
*130	101	May 24, 1893	" & Northern Pacific R. R.		Construction of drawbridge.
*131	116	Sept. 8, 1892	Cudahy Packing Co.		Siding.
132	312	Jan. 14, 1913	Chicago White Lead & Oil Co.		Track 15th and Western (2 contracts).
133	88	Jan. 16, 1903	Chicago Telephone Co.		Erection of poles.
134	85	Nov. 16, 1900	" " "		Erection of poles.
135	88	May 28, 1902	" " "		Erection of poles.
136	480	May 14, 1919	Chicago Telephone Co., et al		Underground conduit, Morgan St.
137	510	Jan. 1, 1920	" " " " " "		Conduit, 42nd and Loomis Sts.
138	499	Apr. 1, 1920	" " " " " "		Conduit.
139	449	Aug. 30, 1918	" " " " " "		Service.
140	477	May 14, 1919	" " " " " "		Conduit in Laurel St.
141	511	Apr. 1, 1920	" " " " " "		Conduit, 31st and Pitney Sts.
142	518	Apr. 1, 1920	" " " " " "		Conduit.
143	189	Sept. 20, 1907	C. J. Rys. and U. S. Yards Co.		Delivery, I. H. B. bonds.
144	212	Mar. 24, 1909	Chicago & Erie R. R. Co.		Inspector's shed, 46th St.
145	233	Nov. 1, 1913	C. R. & I. R. R. et al		Leases.
146	215	Jan. 1, 1909	" " " " " " " "		Reciprocal trackage agreement.
147	507	May 1, 1920	" " " " " " " "		Use of locomotives.
148	400	Nov. 16, 1914	" " " " " " " "		Joint use of property.
149	367	Dec. 31, 1914	Thos. E. Corrigan		Shop right re switch stands.
150	465	June 1, 1919	Central Manufacturing District		Construction of tracks.
151	441	Sept. 1, 1917	" " "		Re Ashland Ave. lands.
152	489	Oct. 15, 1919	" " "		Construction of track.
153	490	Dec. 1, 1919	" " "		Construction of tracks.
154	387	Sept. 1, 1915	Chicago Title & Trust Co.		Lease, Leavitt St. Yard.
155	221	June 12, 1909	H. W. Caldwell & Son		Track to plant.
156	232	Nov. 18, 1909	Chicago Fertilizer Works		Pfaelzer premises
157	234	Jan. 29, 1910	Canal Commissioners		Bridge, Illinois-Michigan Canal.

Various Contracts, Agreements, Etc.—*Continued*

Item No.	File No.	Date	With whom made	Remarks
158	236	Oct. 1, 1909	Cosmopolitan Electric Co.	Conduit, 35th and Iron Sts.
159	255	July 1, 1910	" " "	Permit to cross tracks, 40th and Stewart.
160	297	Aug. 15, 1912	John C. Cosgrove, et al.	Perpetual easement, W. 15th St. lands.
161	470	July 25, 1919	Darling & Co.	Occupation of property, 46th and Cook.
162	179	Sept. 1, 1907	Dairy Shippers Dispatch Co.	Lease tracks, Ashland Ave.
163	494	Dec. 2, 1919	Davies Co.	Industrial track.
164	500	Jan. 15, 1920	Director General of R. R.	Equipment track agreement.
165	381	Aug. 4, 1915	Mrs. Polly Dwyer	License to sell fruit.
166	502	Apr. 30, 1920	S. J. DeVries & Co.	Lease of track.
o167	43	Aug. 3, 1880	Dennis Dorrigan, et al.	Right-of-way (C. & I. S. L. Ry. Co., August 3, 1880).
168	395	Mar. 1, 1916	Delaware & Hudson Co.	Exchange of service re State of Pensylvania laws.
169	403	Apr. 1, 1916	Eagle Ice Co.	Car body space, 40th and Wallace Sts.
170	464	Jan. 1, 1919	Wm. J. Freckleton	Lease.
x171	97	Sept. 21, 1894	" " "	Wagon scale, 47th and Loomis Sts.
172	80	Aug. 29, 1901	Fairbanks Canning Co.	Gas pipe.
x173	50	Dec. 1, 1901	R. Fitzgerald	Switch patent.
174	72	July 1, 1902	" "	Machine shop rent.
175	474	July 31, 1919	Fairbanks, Morse & Co.	Indemnity agreement.
176	315	Feb. 25, 1913	Ford Motor Co.	Switch, 40th St. and Wabash Ave.
177	360	Jan. 2, 1914	John Fitzpatrick Co.	Use of track.
178	132	Jan. 8, 1907	Goodman Manufacturing Co.	Permit for chimney, 48th and Halsted.
179	175	May 5, 1907	" " "	Tracks, 48th and Halsted Sts.
180	459	July 1, 1919	" " "	Lease.
181	503	May 1, 1920	" " "	Assignment of lease, May 1, 1918, U. S. Y. & T. Co. to Goodman.
182	462	Apr. 21, 1919	" " "	Construction of track.
183	463	May 26, 1919	" " "	Construction of track.
184	466	July 16, 1919	" " "	Construction of track.
185	504	Mar. 1, 1920	" " "	Assignment U. S. Y. & T. Co. lease, March 1, 1917.
186	505	March 1, 1920	" " "	Assignment U. S. Y. & T. Co. lease, May 1, 1918.

187	124	Apr.	18,	1906	Grand Trunk & Western Ry. Co.	Exchange of property, 49th and Wallace.
188	155	June	27,	1906	E. Goldman & Co.	Elevating 40th St. track.
189	444	Nov.	18,	1919	Guggenheim Bros.	Construction of track.
190	202	Aug.	19,	1908	Great Western Smelting & Refining Co.	Wallace St. switch.
191	492	Sept.	30,	1918	W. C. Griswold	Lease.
192	61	May	29,	1902	G. H. Hammond Co.	Water pipe.
193	55	Apr.	19,	1902	" " " "	Water pipe.

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194	38	Nov.	14,	1899	Fred'k Honkamp, et al	Water pipe.
x195	46	July	1,	1897	Anna A. Honkamp	Ingress and egress.
x196	32	Oct.	26,	1891	Heisler & Junge Co.	Side track.
197	151	Sept.	30,	1904	Hoff & Brennan	Track at 40th St.
198	143	Dec.	30,	1905	Halsted Coal Co.	Track.
199	145	May	15,	1906	Harder's Fireproof Storage & Van Co.	Switch elevation and bridge.
200	254	July	1,	1910	Hermetic Closure Co.	Switch track.
201	305	Mar.	1,	1911	Hartman Furniture & Carpet Co.	Bridge and track.
202	365	Apr.	1,	1913	" " " " "	Track, 40th and Wentworth Sts.
203	379	July	28,	1915	" " " " "	Lease, platform.
204	481	May	1,	1919	Hately Bros.	Lease of tracks.
205	513	Apr.	1,	1920	" "	Water line, 37th and Iron Sts.
206	487	Jan.	1,	1920	Huber, M., Inc.	Cinder contract.
207	60	Apr.	24,	1902	Intern'l Packing Co.	Brine pipes.
x208	1	July	3,	1892	I. C. R. R.	Interlocking agreement.
x209	95	July	3,	1892	" " " "	Track elevation.
210	95	Nov.	4,	1904	Illinois Central R. R., et al.	Elevation of tracks.
211	160	July	5,	1905	I. C. R. R.	Telephone.
212	304	Oct.	26,	1912	Indiana Harbor Belt R. R., et al.	Spotting service.
213	173	June	29,	1907	Indiana Harbor Belt R. R., et al.	Trackage agreement.
214	164	Jan.	2,	1905	Indiana Harbor R. R. Co.	Track connection, 49th St.
215	152	Feb.	13,	1904	Illinois Northern R. R. Co., et al.	Crossing expenses (memo.).
216	488	Sept.	30,	1918	" " " " "	Rent of premises.
217	107	June	1,	1908	Independent Packing Co.	Subway agreement.
218	78	Nov.	28,	1903	International Harvester Co.	Conduit.
219	197	Mar.	23,	1908	" " "	Easement.

Various Contracts, Agreements, Etc. *Continued*

Item No.	File No.	Date	With whom made	Remarks
220	249	May 31, 1910	International Harvester Co.	Easement for tunnel.
221	282	May 1, 1911	Illinois Tunnel Co.	Attachment of cable.
222	330	Apr. 12, 1913	" Telephone and Telegraph Co.	Track crossing, Canal and Butler Sts.
223	340	Apr. 12, 1913	" Telephone and Telegraph Co.	Crossing and right to attach.
224	519	July 20, 1920	" District Telegraph Co.	Watch box system.
225	446	Sept. 15, 1918	Individual Towel & Cabinet Serv. Co.	Towels, etc.
226	415	Jan. 15, 1917	Int. Bro. of Blacksmiths & Helpers	Wage agreement.
227	430	Dec. 1, 1917	" " " Boilermkrs. & Ship Bldrs.	Wage agreement.
228	328	Jan. 10, 1913	R. W. King	Switching track, 40th St.
229	482	May 1, 1919	" " "	Track lease.
230	335	Sept. 30, 1913	H. V. Krug	Elevation of switch, 40th St.
231	411	June 13, 1916	E. Kennealy	Roof guarantee.
*232	92	Jan. 23, 1901	D. R. Lewis, et al.	Agreement re suit, etc.
233	47	July 17, 1902	L. S. & M. S. R. R.	Use of track.
234	115	June 1, 1898	Live Poultry Transportation Co.	Lease.
*235	112	July 13, 1892	Libby, McNeil & Libby	Agreement re tracks.
*236	230	May 11, 1907	Mary E. Leitsch	Lease (and renewals).
237	286	June 1, 1912	Link Belt Co.	Fence.
238	336	Apr. 24, 1913	Le Moyne, Wm.	40th St. track.
239	346	Jan. 2, 1914	Laly Column Co.	Fence.
240	136	Mar. 1, 1907	M. C. R. R.	Shanty, 45th St.
241	68	Sept. 27, 1900	" " " "	Water pipe.
242	84	Jan. 29, 1903	McCormick Harvester Co.	Water main.
243	398	Feb. 15, 1916	Merchants Loan & Trust Co.	Agreement with J. E. Baum, Jr.
*244	10	Nov. 1, 1893	Mutual Fuel & Gas Co.	Crossing at 41st St.
*245	8	Apr. 28, 1893	" " " "	Water line, 41st St.
246	228	Sept. 30, 1909	Midland Warehouse & Transfer Co.	Easements (two contracts).
247	345	Dec. 1, 1913	" " " " "	Lease.
248	390	Nov. 1, 1915	" " " " "	Lease.
249	421	Mar. 11, 1917	" " " " "	Dead pile agreement.

250	278	Nov.	28, 1910	Walter Mills	15th St. property.
251	279	May	1, 1911	" "	
252	91	June	6, 1901	Metropolitan West Side Ry. Co.	Lease. (See No. 290.)
253	386	Oct.	1, 1915	Massachusetts Bonding & Ins. Co.	Right for elevated tracks.
254	186	Aug.	..., 1907	Morris & Co.	Soliciting applications.
255	443	Aug.	20, 1918	" " "	Lights.
256	385	Sept.	1, 1915	" " "	Indemnity agreement.
257	432	Dec.	19, 1917	International Assn. of Machinists	Land at 45th St.
258	16	May	26, 1893	Nash, J. F.	Working agreement.
259	163	Jan.	31, 1906	National Car Line Co.	Track agreement.
260	214	Apr.	1, 1909	North American Provision Co.	Lease, 46th St.
261	375	May	28, 1915	N. Y. C. R. R.	Permit for crossing.
262	404	May	1, 1916	National Wool Wholesale & Stge. Co.	Exchange agreement.
263	420	Feb.	7, 1917	" Railway Time Service Co.	Lease.
264	512	Apr.	1, 1920	Thomas F. O'Brien	Watch service.
265	439	July	1, 1918	Otis Elevator Co.	Lunch room ground.
266	433	Nov.	1, 1917	Oxweld Acetylene & Wizard Prod. Co.	Inspection.
267	58	Apr.	1, 1902	Pabst Brewing Co.	Division of track expenses.
268	89	Jan.	17, 1903	" " "	42nd St. property.
269	269	Jan.	16, 1911	" " "	Pipe line.
270	388	Nov.	1, 1915	Samuel Peterson	Easement.
271	170	Aug.	19, 1905	Pennsylvania Co.	Lease, 35th and Aberdeen track.
272	157	July	3, 1905	" "	Relocating crossing.
273	174	Nov.	16, 1907	" "	Track elevation.
274	469	July	18, 1919	Pick & Co., Albert	Lighting agreement.
275	126	Dec.	1, 1906	Provision Dealers' Dispatch	Track construction.
276	87	Aug.	1, 1901	Postal Telegraph Cable Co.	Pipe line.
277	66	Nov.	22, 1902	P. G. L. & C. Co.	Conduit.
278	354	Dec.	1, 1913	" " " " " "	Pipe lines.
279	392	Dec.	1, 1915	" " " " " "	Lease, right of way.
280	478	Mar.	1, 1919	" " " " " "	Service pipe.
281	429	Aug.	1, 1917	" " " " " "	Lease, etc.
282	438	May	1, 1918	" " " " " "	Pipe line.
					Pipe line.

Item No.	File No.	Date	With whom made	Remarks
283	167	Nov. 12, 1902	P. C. C. & St. L. R. R., et al	Crossing agreement.
284	157	Jan. 21, 1905	" " " " " " " " " "	Track connection.
285	119	June 30, 1905	" " " " " " " " " "	Lighting subway.
a286	218	June 18, 1909	P. C. C. & St. L. R. R.	Supplement to 157 and 159.
287	157½	Jan. 21, 1905	" " " " " " " " "	Crossover, 49th St., etc.
288	159	Jan. 21, 1905	" " " " " " " " "	Trackage agreement.
289	57	Feb. 21, 1902	Payson, Geo. L.	Release.
290	461	Apr. 12, 1919	Pullman Coach Co.	Construction of track.
291	270	Feb. 10, 1911	Pfaelzer, Louis	Guy wire posts.
292	275	Mar. 30, 1911	" "	Guy wire posts.
293	410	July 1, 1913	" "	Easement and agreement.
294	517	Mar. 11, 1920	" "	Guy wire agreement.
295	111	Apr. 26, 1902	Prackna, John Jos.	Shed right.
296	108	July 1, 1901	Rittenhouse & Embree	Sewer lease.
297	106	Oct. 26, 1906	" " "	Pipes, permit.
298	454	Dec. 1, 1918	Robertson Bros.	Lease 37th and Morgan.
299	341	Oct. 10, 1913	Rockwood Sprinkler Co.	Sprinkler agreement.
300	506	Mar. 1, 1920	Robinson Coal Co., Milton E.	Assignment by U. S. Y. & T. Co., lease, Feb. 1, 1915.
301	64	Sept. 26, 1902	Rogers, H. W., et al	Pipe permit.
302	123	Mar. 24, 1906	Spoor, Codman, et al	Easement, 39th St.
303	77	May ..., 1904	Spoor & Winston	Deed, track, 38th St.
a304	3	May 23, 1887	Sexton, Patrick J.	Side track.
a305	29	Nov. 14, 1895	Sanitary District of Chicago	Bridge.
306	276	Mar. 31, 1911	" " " "	Wire crossing.
307	284	Oct. 5, 1911	" " " "	Wire transmission.
308	29	Apr. 17, 1897	" " " "	Bridges.
309	209	Mar. 5, 1909	" " " "	Intersection, Lowe Ave.
310	110	Apr. 13, 1900	Sturges, Frank	Construction of track.
311	98	Jan. 10, 1902	Schneck, S. C.	Fence.
312	113	July 31, 1903	Swift & Co.	Water pipe.

313	54	Oct.	1, 1919	" " " et al	Viaduct.
314	67	May	..., 1901	" " "	Pipe.
315	86	July	..., 1900	" " "	Pipe line.
316	130	Apr.	30, 1901	" " "	Laying pipe.
317	245	Mar.	6, 1907	" " "	Laying pipe.
318	426	Feb.	12, 1910	" " "	Track scale.
319	434	May	1, 1917	" " "	Water main.
[fol. 164]		Oct.	1, 1917	" " "	Conduits, etc.
320	452	May	11, 1918	Swift & Co., et al	Elevated viaduct.
321	456	May	15, 1919	" " "	Driveway.
322	447	Nov.	1, 1917	" " "	Encroachment of warehouse.
323	460	Jan.	22, 1919	" " "	Conduit.
324	484	Sept.	15, 1919	" " "	Track maintenance.
325	485	Sept.	15, 1919	" " "	Rubbish platform lease.
326	496	Jan.	1, 1920	" " "	Robey St. tracks.
327	26	Nov.	26, 1875	John F. Tracy, et al	Right of way.
328	422	Nov.	1, 1916	Swift Refrigerator Transportation Co	Strip of land.
329	521	Feb.	2, 1920	" " " "	Water main.
330	120	Sept.	15, 1905	Schwarzchild & Sulzberger	Inspector's shanty.
331	63	July	16, 1902	" " "	Pipe line.
332	364	Dec.	1, 1913	Spoor & Leonard	Lease, C. M. D. property.
333	399	Mar.	20, 1916	" " " & Thayer	Easement.
334	99	Nov.	9, 1900	John B. Sherman, et al	Tucker track lights.
335	397	Mar.	20, 1916	The Streets Co	Equipment lease.
336	419	Oct.	1, 1916	Sefton Manufacturing Corporation	Construction of crossing.
337	356	Dec.	27, 1913	South Side Elevated R. R	Indiana Ave. station.
338	202	Apr.	30, 1912	Standard Slaughtering Co	Use of Wallace St.
339	222	June	17, 1909	Simmons Manufacturing Co	Construction of track.
340	6	Aug.	22, 1887	Streets Stable Car Line Co	Track connection.
341	7	Dec.	1, 1887	Streets Stable Car Line Co	Track connection.
342	25	May	1, 1907	Universal Gas Co	Archer Ave. right.
343	39	Nov.	30, 1903	" " "	Track lease.
344	162	Mar.	20, 1906	United Telephone Electric Co	Poles.
345	290	Mar.	28, 1912	U. of C	Lease, alley, 15th St.

Item No.	File No.	Date	With whom made	Remarks
346	455	Mar. 15, 1919	U. S. Y. Distr. Agcy.	Office space.
347	273	May 1, 1917	" " " " "	Lease, railroad track.
348	348	Dec. 1, 1913	U. S. Y. & T. Co.	Lease, railroad track.
349	262	Oct. 1, 1916	" " " " " "	Lease.
350	412	Oct. 1, 1916	" " " " " "	Wallace St. property.
351	435	May 1, 1917	" " " " " "	Livingston siding.
x352	21	Nov. 18, 1885	Union Steel Co.	Exchange of tracks.
353	402	July 12, 1916	Viscosity Oil Co.	Pipe line.
354	140	Feb. 7, 1907	E. J. Winslow Co.	Construction of track.
355	169	Dec. 1, 1905	Wabash R. R.	Use of elevators.
356	414	Jan. 22, 1917	Western Union Telegraph Co.	Signal service.
x357	11	Mar. 5, 1892	" " " "	Coal rights.
358	473	July 1, 1919	" " " "	Conduit.
359	475	May 12, 1919	" " " "	Conduit.
360	515	Apr. 1, 1920	" " " "	Permission to attach conduits.
361	520	Apr. 26, 1920	" " " "	Permission to attach conduits.
362	183	July 17, 1907	West Chicago Park Commissioners.	Marshall Blvd. subway.
363	299	Oct. 19, 1913	Wabash R. R.	Traffic agreement.
364	386	Mar. 1, 1916	" " "	33rd St. property.
365	516	Feb. 2, 1920	Wilson & Co.	Permission for sign.
366	495	Mar. 15, 1920	Wm. Wrigley, Jr. Co.	Construction of tracks.
x367	117	July 3, 1891	T. E. Wells Co.	Construction of tracks.
x368	114	Sept. 10, 1890	" " " "	Construction of tracks.
x369	37	May 21, 1891	Henry E. Weaver.	Side track agreement.
370	27	Aug. 31, 1893	West and South Town Street Ry. Co.	Crossing, 22nd St.
x371	23	Dec. 10, 1895	" " " " " " "	Crossing, 23rd St.
x372	24	Nov. 19, 1895	" " " " " " "	Crossing, 26th St.
x373	13	June 25, 1880	John A. Yale, et al.	Archer Ave.
x374		June 10, 1920	Trustees of Central Mfg. District and Sanitary District of Chicago.	Easement for temporary ditch and bridge.
x375		Aug. 10, 1920	Sanitary District of Chicago.	Easement for conduit in Stk. Yds. Slip.
x376		About July 1, 1920	City of Chicago.	Easement for sewer south thru Stk. Yds.

NOTE—Items marked (x) were made by Union Stock Yard & Transit Co.
NOTE—Items marked (x) were made by Chicago & Indiana State Line Ry. Co.

[fol. 165] Union Stock Yard and Transit Company

I

Funded Debt

(a) The Union Stock Yard and Transit Company has executed a trust deed to the First Trust & Savings Bank, dated January 1, 1920, securing $500,000.00 debenture bonds maturing January 1, 1930. This trust deed states that the Union Stock Yard and Transit Company shall not place upon its property any other mortgage or lien that shall take priority over these bonds. Although this item does not affect the interests of the Chicago Junction, it is inserted here for the purpose of disclosing the issue of bonds secured by the Union Stock Yard and Transit Company property.

II

Equipment Obligations

(a) None.

III

Leasehold and Easement Obligations

(a) None. Attention, however, is called to the lease from the Union Stock Yard and Transit Company to the Chicago Junction Railway dated December 1, 1913, and supplemental lease of January 1, 1918, mentioned and disclosed as items (d) and (e) under Caption III Leasehold and Easement Obligations of Exhibit "B" of the Chicago Junction Railway.

[fol. 166] Exhibit 2 to Petition

The New York Central Railroad Company

I, Joseph M. O'Mahoney, Assistant Secretary of The New York Central Railroad Company, hereby certify the following to be a correct transcript from the minutes of the proceedings of the Executive Committee of the Board of Directors of said company at a meeting held at the General Office Building, Grand Central Terminal, in the City of New York, on Wednesday, July 28, 1920.

The President stated that he had negotiated on behalf of The New York Central Railroad Company an agreement with The Chicago Junction Railways and Union Stock Yards Company, a corporation organized under the Laws of the State of New Jersey, for the acquisition of all of the capital stock of The Chicago River and Indiana Railroad Company, an Illinois corporation operating a railroad in the County of Cook and State of Illinois, and also for the making of a lease either to said railroad company or to The

New York Central Railroad Company of all of the properties (owned and leased) of The Chicago Junction Railway Company, an Illinois corporation, likewise operating a railroad in Cook County, Illinois, and for options to acquire eventually all of the capital stock of said The Chicago Junction Railway Company and all of its properties and other appurtenances.

He stated that the particulars of the agreement so negotiated were in substance as follows:

Within thirty days after approval of the proposed agreement by the Interstate Commerce Commission and other public authorities having jurisdiction in the premises, The New York Central Railroad Company is to pay $750,000 for the total capital stock of said The Chicago River and Indiana Railroad Company aggregating at par $500,000 in either cash or such securities as the Vendor and Vendee shall agree upon.

Such contract of sale and purchase is to be made upon condition that the properties of said railroad company shall be free and clear of all liens except a certain mortgage made by it on October 1, 1911, [fol. 167] to The Merchants Loan and Trust Company, Trustee, and an indenture supplemental thereto to secure an aggregate outstanding issue of bonds of $765,000.

Simultaneously The Chicago Junction Railway Company is to make a lease to either said The Chicago River and Indiana Railroad Company or to The New York Central Railroad Company as such latter company shall elect, of all of its properties and appurtenances, including certain properties leased to the said Junction Company under a certain lease dated December 1, 1913, and certain supplements thereto by The Union Stock Yard and Transit Company of Chicago, a corporation organized under the Laws of the State of Illinois and owning, among other properties, a railroad located in Cook County, Illinois.

Said lease is to continue for a period of 99 years and thereafter at the option of the Lessee in perpetuity, and the annual rental to be reserved therein is $2,000,000 payable in quarterly installments of $500,000 each, except that the first two installments are to be for $250,000 each, and the Lessee is to pay taxes and assessments in addition. Such lease is to be in detail in such form as counsel representing the respective parties thereto shall agree upon.

The New York Central Railroad Company is to have the option during the term of said lease or any extension thereof to purchase the total capital stock of said The Chicago Junction Railway Company amounting to 55,000 shares of $100 each, now pledged under a certain mortgage and supplement thereto by The Chicago Junction Railways and Union Stock Yards Company to The Standard Trust Company of New York, Trustee, Guaranty Trust Company of New York, Successor in Trust, whenever said stock can be released from the lien of said Mortgage, for the sum of $22,987,516 which represents the capitalization on a 6% basis of such portion of the annual rental above reserved of $2,000,000 as is applicable to the properties of The Chicago Junction Railway Company other than

[fol. 168] those leased to it by The Union Stock Yard and Transit Company of Chicago.

The New York Central Railroad Company is also to have the option, during the term of said lease or of any extension thereof, to purchase all of the franchises, lands leaseholds, trackage rights, equipment and all other railroad properties of The Chicago Junction Railway Company and, also, of the properties leased to it by The Union Stock Yard and Transit Company of Chicago, for the sum of $33,333,333, being the capitalization at 6% of said annual rental of $2,000,000 and of said purchase price approximately $22,987,516 is to be paid to The Chicago Junction Railway Company for its property and approximately $10,345,617 is to be paid to The Union Stock Yard and Transit Company of Chicago for its leased property; the latter item representing a capitalization at 6% of the sum of approximately $620,749 which is the annual rental reserved in the lease of December 1, 1913, and of supplements thereto of the properties of The Union Stock Yard and Transit Company of Chicago leased to The Chicago Junction Railway Company.

Said The Chicago Junction Railways and Union Stock Yards Company, as the owner of all of the capital stock of said The Chicago Junction Railway Company and of said The Union Stock Yard and Transit Company of Chicago and of 50% of the stock of said The Chicago River and Indiana Railroad Company is to see to it that the above transactions provided for will be carried out in accordance with their terms and that the properties, including stocks, railroad properties and all appurtenances to be so sold or leased will be free and clear of all liens except as specified in Exhibits "A" and "B" to be attached to the agreement.

After discussion and consideration the following resolution was, on motion, adopted:

Resolved: That the President or any Vice President, be, and he hereby is, authorized to execute, in the name of this company and under its seal, an agreement containing in substance the provisions [fol. 169] above stated and in form substantially in accordance with a copy thereof now submitted to this meeting.

Further resolved: That said agreement shall contain such other additional provisions as to the President or any Vice President shall seem to be appropriate in the interest of this company.

Said agreement and the provisions thereof are to be effective only when the same shall have been approved and authorized pursuant to law by order of the Interstate Commerce Commission and of such other Governmental bodies if any as may have jurisdiction in the premises and also only after counsel for this company shall have approved all titles, leaseholds, grants and other rights and interests involved in the same.

(Sgd.) J. M. O'Mahoney.

[fol.170] EXHIBIT 3 to PETITION

I, Martin A. Taylor, Secretary of The Chicago Junction Railways and Union Stock Yards Company, Hereby Certify the following to be a correct transcript from the minutes of the proceedings of the Board of Directors of said company at a meeting held at the office of the Company in the City of New York, on July 21st, 1920.

The President stated that he had negotiated on behalf of the Company an agreement with the New York Central Railroad Company for the sale of the capital stock of The Chicago River and Indiana Railroad Company, an Illinois corporation operating a railroad in the County of Cook and State of Illinois, and also for the making of a lease either to said railroad company or to The New York Central Railroad Company of all of the properties (owned and leased) of The Chicago Junction Railway Company, an Illinois corporation likewise operating a railroad in Cook County, Illinois, and for options to the said The New York Central Railroad Company on the capital stock of said The Chicago Junction Railway Company and all of its properties and other appurtenances.

He stated that the particulars of the agreement so negotiated were in substance as follows:

Within thirty days after approval of the proposed agreement by the Interstate Commerce Commission and other public authorities having jurisdiction in the premises, The New York Central Railroad Company is to pay $750,000 for the total capital stock of said The Chicago River and Indiana Railroad Company aggregating at par $500,000 in either cash or such securities as the Vendor and Vendee shall agree upon.

Such contract of sale and purchase is to be made upon condition that the properties of said railroad company shall be free and clear of all liens except a certain mortgage made by it on October 1, 1911, to The Merchants Loan and Trust Company, Trustee, and an indenture supplemental thereto to secure an aggregate outstanding issue of bonds of $765,000.

[fol. 171] Simultaneously The Chicago Junction Railway Company is to make a lease to either said The Chicago River and Indiana Railroad Company or to The New York Central Railroad Company, as such latter company shall elect, of all of its properties and appurtenances, including certain properties leased to the said Junction Company under a certain lease dated December 1, 1913, and certain supplements thereto by The Union Stock Yard and Transit Company of Chicago, a corporation organized under the Laws of the State of Illinois and owning, among other properties, a railroad located in Cook County, Illinois.

Said lease is to continue for a period of 99 years and thereafter at the option of the Lessee in perpetuity, and the annual rental to be reserved therein is $2,000,000 payable in quarterly installments of $500,000 each, except that the first two installments are to be for $250,000 each, and the Lessee is to pay taxes and assessments in addition. Such lease is to be in detail in such form as counsel repre-

senting the respective parties thereto shall agree upon. If such lease is made to The Chicago River and Indiana Railroad Company The New York Central Railroad Company is to guarantee the payment of the rental and the performance of all the obligations of The Chicago River and Indiana Railroad Company.

The New York Central Railroad Company is to have the option during the term of said lease or any extension thereof to purchase the total capital stock of said The Chicago Junction Railway Company amounting to 55,000 shares of $100 each, now pledged under a certain mortgage and supplement thereto by The Chicago Junction Railways and Union Stock Yards Company to The Standard Trust Company of New York, Trustee, Guaranty Trust Company of New York, Successor in Trust, whenever said stock can be released from the lien of said mortgage, for the sum of $22,987,516 which represents the capitalization on a 6% basis of such portion of the annual rental above reserved of $2,000,000 as is applicable to the properties [fol. 172] of The Chicago Junction Railway Company other than those leased to it by The Union Stock Yard and Transit Company of Chicago.

The New York Central Railroad Company is also to have the option, during the term of said lease or of any extension thereof, and subject to the obligations of this Company under the above mentioned mortgage, to purchase all of the franchises, lands, leaseholds, trackage rights, equipment and all other railroad properties of The Chicago Junction Railway Company and, also, of the properties leased to it by The Union Stock Yard and Transit Company of Chicago, for the sum of $33,333,333, being the capitalization at 6% of said annual rental of $2,000,000 and of said purchase price approximately $22,987,516 is to be paid to The Chicago Junction Railway Company for its property and approximately $10,345,617 is to be paid to The Union Stock Yard and Transit Company of Chicago for its leased property; the latter item representing a capitalization at 6% of the sum of approximately $620,749 which is the annual rental reserved in the lease of December 1, 1913, and of supplements thereto of the properties of The Union Stock Yard and Transit Company of Chicago leased to The Chicago Junction Railway Company.

The Chicago Junction Railways and Union Stock Yards Company, as the owner of all of the capital stock of said The Chicago Junction Railway Company and of said The Union Stock Yard and Transit Company of Chicago and of 50% of the stock of said The Chicago River and Indiana Railroad Company is to see to it that the above transactions provided for will be carried out in accordance with their terms and that the properties, including stocks, railroad properties and all appurtenances to be so sold or leased will be free and clear of all liens except as specified in Exhibits "A" and "B" to be attached to the agreement.

After discussion and consideration the following resolution was, on motion, adopted:

Resolved: That the President or any Vice President, be, and he hereby is, authorized to execute, in the name of this company and

[fol. 173] under its seal, an agreement containing in substance the provisions above stated and in form substantially in accordance with a copy thereof now submitted to this meeting.

Further resolved: That said agreement shall contain such other additional provisions as to the President or any Vice President shall seem to be appropriate in the interest of this company.

Said agreement and the provisions thereof are to be effective only when the same shall have been approved and authorized pursuant to law by order of the Interstate Commerce Commission and of such other Governmental bodies, if any, as may have jurisdiction in the premises and also only after counsel for this company shall have approved all titles, leaseholds, grants and other rights and interests involved in the same.

Attest: Martin A. Taylor, Secretary. [Seal.]

[fols. 174 & 175] Exhibit 4 to Bill of Complaint—Filed June 28, 1923

Interstate Commerce Commission

Washington

Secretary's certificate omitted in printing.

[File endorsement omitted.]

[fol. 176] BEFORE THE INTERSTATE COMMERCE COMMISSION

Application 1 Ac—50

Finance Docket No. 1165

In re Application of THE NEW YORK CENTRAL RAILROAD COMPANY for authority and for a certificate of public convenience evidencing the Commission's approval in respect of the following (a) The purchase by the New York Central Railroad Company of all of the capital stock of the Chicago River and Indiana Railroad Company; (b) the leasing by the Chicago Junction Railway Company for a term of ninety-nine years and thereafter at the election of the lessee in perpetuity of all its properties (owned and leased) to the Chicago River and Indiana Railroad Company; (c) the granting to the New York Central Railroad Company of an option to purchase all of the capital stock of the Chicago Junction Railway Company or all of the properties to be leased by it to the Chicago River and Indiana Railroad Company; all pursuant to the provisions of paragraphs 18 to 22 inclusive of section 1 and of paragraph 2 of section 5 of the interstate commerce act.

RETURN TO QUESTIONNAIRE

The New York Central Railroad Company has made application to the Interstate Commerce Commission under paragraphs (18) to (22), inclusive, of Section 1, and under paragraph (2) of Section 5 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, for authority and for a certificate of public convenience and necessity in respect of the following:

[fol. 177] (1) To enter into an agreement with The Chicago Junction Railways and Union Stock Yards Company providing:

(a) That the New York Central Railroad Company shall purchase for the sum of $750,000, to be paid in cash or in such securities as the Vendor and Vendee shall agree upon, all of the capital stock of The Chicago River and Indiana Railroad Company;

(b) That The Chicago Junction Railway Company shall lease at an annual rental of $2,000,000, payable in quarterly installments of $500,000 each at the expiration of each quarter year during the term, except that the first two installments shall be for the sum of $250,000 each, for a term of ninety-nine (99) years, and thereafter at the election of the Lessee in perpetuity, to The Chicago River and Indiana Railroad Company all of its properties of every kind and character, including those held by it in lease under a certain indenture dated December 1, 1913, made between The Union Stock Yard and Transit Company of Chicago, as Lessor, and said The Chicago Junction Railway Company, as Lessee, and supplements thereto

(c) That The New York Central Railroad Company be granted an option, to be exercised during the term of said lease, to purchase either from The Chicago Junction Railways and Union Stock Yards Company, a New Jersey corporation, all of the capital stock of said The Chicago Junction Railway Company for the sum of $22,987,516, to be paid in cash or in such securities as the Vendor and Vendee shall agree upon, or to purchase from the respective owners thereof all of the properties of every kind and character and the reversionary interests therein of respectively The Chicago Junction Railway Company and The Union Stock Yard and Transit Company of Chicago, to be leased pursuant to the agreement for which approval is herein sought, by The Chicago Junction Railway Company to The Chicago [fol. 178] River and Indiana Railroad Company, for the sum of $33,333,333, payable in cash or in such securities as the Vendor and the Vendee shall agree upon, of which purchase price $22,987,516 is to be paid to The Chicago Junction Railway Company and $10,345,817 to The Union Stock Yard and Transit Company of Chicago.

(2) To each of the corporations above named, including your petitioner, to execute all assignments, transfers, leases, deeds and other instruments and agreements necessary to make the transfers, leases and conveyances in said agreement provided for.

Receipt of said application has been acknowledged by the Interstate Commerce Commission and is particularly designated as Application 1 Ae-50, Finance Docket No. 1165. The New York Central Railroad Company hereby affirms that the notice and a summary of the application have been published in the manner and form prescribed by the Commission for three consecutive weeks as follows, to-wit:

In the Chicago Tribune, a daily newspaper of general circulation published in the City of Chicago on January 7th, 14th and 21st, 1921;

In the Lake County Times, a daily newspaper of general circulation published in Hammond, Lake County, Indiana, on January 7th, 14th and 21st, 1921.

of which publications clippings are enclosed, and that said newspapers are in general circulation in respectively the following states and the following counties or parishes therein, to-wit:

The County of Cook, in the State of Illinois, and
The County of Lake, in the State of Indiana.

[fol. 179] which are all of the states and counties or parishes in or through which the line of railroad is constructed or is to be constructed, or operates or is to operate, or all or any portion of a line of railroad, or the operation thereof, which is to be abandoned, is located, and hereinafter submits the facts and answers to questions which are required by said Commission with respect to such application:

Section I

(1) Is the applicant a carrier by railroad engaged in the transportation of passengers and property, subject to the Interstate Commerce Act?

Answer. Yes.

(2) Did the applicant file with the Interstate Commerce Commission an annual report for the calendar year next preceding the year in which said application was filed?

Answer. Yes.

Section IV

(51) A full and complete statement of what it is proposed or desired to do, i. e., whether to acquire, operate, or engage in transportation over said line of railroad.

Answer. It is proposed—

(a) That The New York Central Railroad Company shall purchase for the sum of $750,000 all of the capital stock of The Chicago River and Indiana Railroad Company;

(b) That The Chicago Junction Railway Company shall lease at an annual rental of $2,000,000, payable in quarterly installments, except that the first two installments shall be for the sum of $250,000 [fol. 180] each, for a term of ninety-nine (99) years, and thereafter, at the election of the Lessee, in perpetuity, to The Chicago River and Indiana Railroad Company all of the properties of The Chicago Junction Railway Company, including those held by it under a certain indenture of lease dated December 1, 1913, made between The Union Stock Yard and Transit Company of Chicago, as Lessor, and said The Chicago Junction Railway Company, as Lessee, and supplements thereto;

(c) That The New York Central Railroad Company shall acquire an option, to be exercised during the term of said lease, as follows:

(1) To purchase from The Chicago Junction Railways and Union Stock Yards Company all of the capital stock of The Chicago Junction Railway Company for the sum of $22,987,516., or

(2) To purchase from the respective owners thereof all of the properties of every kind and character, and the reversionary interest therein, of respectively The Chicago Junction Railway Company and The Union Stock Yard and Transit Company of Chicago, to be leased by The Chicago Junction Railway Company to The Chicago River and Indiana Railroad Company, for the sum of $33,333,333., of which purchase price $22,987,516 is to be paid to The Chicago Junction Railway Company and $10,345,817. to The Union Stock Yard and Transit Company of Chicago.

(52) A full and complete statement of all the matters and things proposed in connection therewith.

(a) The names and addresses of all persons, natural or artificial, directly involved in such proposals, and their interest in or connection therewith.

[fol. 181] Persons Natural.—Richard Fitzgerald, owner of 2,500 shares of stock of The Chicago River and Indiana Railroad Company, the total capital stock of which railroad company is 5,000 shares of the par value of $100. each, which shares of stock so owned by said Richard Fitzgerald it is proposed shall be purchased by The New York Central Railroad Company, as hereinbefore stated.

Persons Artificial.—

The Chicago Junction Railways and Union Stock Yards Company, a corporation organized and existing under and by virtue of the Laws of the State of New Jersey, owner of 2,500 shares of stock of The Chicago River and Indiana Railroad Company, which shares of stock it is proposed shall be purchased by The New York Central Railroad Company as hereinbefore stated;

Owner of all of the capital stock of The Chicago Junction Railway Company being 55,000 shares of the par value of $100. each and now pledged under the certain Mortgage and Deed of Trust dated April 10, 1900, made by The Chicago Junction Railways and Union Stock Yards Company to The Standard Trust Company of New York, Trustee, Guaranty Trust Company of New York, Successor in Trust, and supplemental indenture thereto, which shares of stock it is proposed that The New York Ceneral Railroad Company shall have an option to purchase upon release of the same from the lien of said Mortgage and Deed of Trust;

Owner of all of the capital stock of The Union Stock Yards and [fol. 182] Transit Company of Chicago, being 132,000 shares of the par value of $100. each, and now pledged under said certain Mortgage and Deed of Trust and supplemental indenture thereto, made by said The Chicago Junction Railways and Union Stock Yards Company to the Standard Trust Company of New York, Trustee, Guaranty Trust Company of New York Successor in Trust;

The Union Stock Yard and Transit Company of Chicago, a corporation organized and existing under and by virtue of the Laws of the State of Illinois, owner of certain properties and appurtenances located in the County of Cook and State of Illinois, demised and leased to The Chicago Junction Railway Company in perpetuity under a certain indenture dated December 1, 1913, made between The Union Stock Yard and Transit Company of Chicago, as Lessor, and The Chicago Junction Railway Company, as Lessee, and supplements thereto, and proposed to be leased, as hereinbefore stated to The Chicago River and Indiana Railroad Company, and which said properties and appurtenances it is proposed that The New York Central Railroad Company shall have an option to purchase;

The Chicago Junction Railway Company, a corporation organized and existing under and by virtue of the Laws of the State of Illinois, Owner and Lessee of certain lines of railroad and appurtenant properties located in the County of Cook and State of Illinois,

and proposed to be leased, as hereinbefore stated, to The Chicago River and Indiana Railroad Company, and which said properties and appurtenances it is proposed that The New York Central Railroad Company shall have an option to purchase;

[fol. 183] The Chicago River and Indiana Railroad Company, a corporation organized and existing under and by virtue of the Laws of the State of Illinois, Owner of certain lines of railroad and appurtenant property located in the County of Cook and State of Illinois, all of the capital stock of which railroad company, amounting to 5,000 shares of the par value of $100 each, it is proposed shall be acquired by The New York Central Railroad Company.

(b) Location of railroad lines:

The location of lines of railroad of The Chicago River and Indiana Railroad Company is as follows, to wit:

Certain lines of railroad with various branches, spurs, extensions, yards and other appurtenances located in the City of Chicago, beginning at a point at or near the Intersection of West 39th Street and Western Avenue in said City and extending thence in a southeasterly and southerly direction to West 49th Street; thence westerly along the north line of West 49th Street to St. Louis Avenue in said City, which lines of railroad connect with the lines of railroad operated by The Chicago Junction Railway Company.

The location of the lines of railroad of The Chicago Junction Railway Company is as follows, to-wit:

Owned Lines.—All of the Iron Street Line (so-called) extending from approximately the junction of West 34th Street and Iron Street in the City of Chicago in a general southeasterly and southerly direction to West 39th Street in said City; all of the Racine Avenue Line (so-called) extending from approximately the junction of [fol. 184] Pitney Court and Archer Avenue in the City of Chicago in a general southeasterly and southerly direction to West 39th Street.

Leased Lines.—

The certain estates in leasehold in perpetuity demised to The Chicago Junction Railway Company under and by virtue of the terms of a certain indenture made the first day of December, A. D., 1913, by and between The Union Stock Yard and Transit Company of Chicago, party of the first part, and The Chicago Junction Railway Company, party of the second part, and by certain supplements thereto, in and to all the railroad properties and appurtenances therein demised, which properties are described generally as follows:

All of the railroad right of way and the line of railroad and railroad tracks belonging to The Union Stock Yard and Transit Company of Chicago extending from a connection with the tracks of the Illinois Central Railroad Company at or near the shore of Lake Michigan, near 42nd Street, in the City of Chicago, and thence in a general westerly and northerly direction to the terminus in Sec-

tion 19, Township 39 North, Range 14 East of the Third Principal Meridian, which is under lease to and is now operated by The Chicago Junction Railway Company (expressly excluding all that portion of the railroad right of way and railroad of The Union Stock Yard and Transit Company of Chicago east of South Dearborn Street, which has been heretofore leased or granted to The Chicago Junction Railroad Company, an Illinois corporation).

[fol. 185] The Chicago River and Indiana Railroad and The Chicago Junction Railway form a switching railroad within the inner switching zone and are located about two miles from the population center of the City of Chicago.

This railroad property, including the leased lines of railroad above described, leased from The Union Stock Yard and Transit Company of Chicago, consists of railroad branches, spurs and yards serving the stock yards, the packing house district and the Central Manufacturing District located in Chicago.

These railroad properties have the following diverging lines:

The 40th Street Branch, leading easterly, forming connections with the Eastern Trunk Lines and to a connection with the Illinois Central at the Lake Front;

The Park Mains southerly to a connection at 49th Street with the Indiana Harbor Belt Railroad, which is The New York Central Railroad Company's outer belt line and which forms a connection with the railroads entering Chicago;

The Campbell Avenue Line northerly forming connections with the Western Trunk Lines and to a connection with the Chicago and North Western Railway near 14th Street.

A portion of The Chicago River and Indiana Railroad southerly to a connection with the Indiana Harbor Belt Railroad near Western Boulevard and 49th Street;

A portion of The Chicago River and Indiana Railroad easterly from a point near the intersection of the Campbell Avenue Line and the Santa Fe to waterfront property on the West Fork of the South Branch of the Chicago River and on the Chicago Drainage Canal.

[fol. 186] The Chicago River and Indiana Railroad and The Chicago Junction Railway, including the trackage rights which they enjoy over the Atchison, Topeka and Santa Fe Railway, the Pennsylvania Railroad and the Indiana Harbor Belt Railroad, form an integral operating unit embracing the territory described.

(c) Length of railroads in miles and fractions of a mile and description of physical properties:

The Chicago River and Indiana Railroad embraces the following

Tracks:

First main tracks	3.150 Miles
Second main tracks	1.633 "
Yard tracks and sidings	13.066 "
Total	17.849 Miles

Industry Tracks:

Owned (Off C. R. & I. R. R. of W.)	4.544 Miles.
Operated by trackage	11.419 "
Total	15.963 Miles.

Trackage Rights:

Main tracks, 1st and 2nd	24.316 Miles.
Sidings—Yards	32.490 "
Total	56.806 Miles.

Waterfront Facilities:

A dock and slip ("Boat House Slip") formed by a timber bulkhead in the South Branch of the Chicago River, with a transfer platform on one side of the slip and a brick dock house on the other. [fol. 187] These facilities are on property leased from the Santa Fe Railway, but are owned by the Chicago River and Indiana Railroad.

A car-ferry landing, a slip ("Nessen Warehouse Slip"), frame warehouse and platform on the drainage canal. The facilities are on property leased from the Sanitary District and will remain the property of the lessor upon the expiration of the lease in 1956.

Miscellaneous Facilities:

Some miscellaneous frame structures such as a garage, car repair shanty, storehouse and yard office in the vicinity of the riverfront, also on property leased from the Atchison, Topeka & Santa Fe Railway.

A team yard at 49th Street.

The only important bridge structure on the Chicago River and Indiana Railroad is a timber framed bent trestle with two steel deck girder spans that carries two tracks over the Pennsylvania and B. & O. R. R. tracks to connect with the Indiana Harbor Belt Railroad at 49th Street.

There are no telegraph lines.

The Chicago River and Indiana Railroad Company have no shop and engine house facilities but use the facilities of The Chicago Junction Railway Company.

The Chicago Junction Railway embraces the following:

Tracks:

First main tracks	11.222 Miles.
Second main tracks	9.791 "
Yard tracks, sidings, etc.	152.8 "
Total	173.813 Miles.

[fol. 188] Industry Tracks:

Industry tracks owned	26.20 Miles.
Industry tracks operated by connection	71.23 "
Industry tracks operated by trackage	1.69 "
Total	99.12 Miles.

Trackage Rights:

Main tracks	2.24 Miles.
Spurs and Yards	3.48 "
Total	5.72 Miles.

Principal Yards:

The 47th Street Yard and the Loomis Street Yard for the receiving and departure from the packing house and stock yard districts;

Racine Avenue and 39th Street Yard for Central Manufacturing District;

Leavitt Street Yard for delivery and set out from 43rd Street, L. C. L. freight station;

General Ashland Avenue receiving and departure Yard.

Local Freight Facilities:

Team yards at Lake Park Avenue, at Wallace Street, at 15th Street and minor ones at other locations.

Freight house and yard at 15th Street with a track spotting capacity of 40 cars. The building is a modern four story brick structure and the most important local freight facility.

[fol. 189] L. C. L. freight station at 43rd and Robey Streets, a two-story brick structure with transfer sheds and platforms and track spotting space for 120 cars.

This is the point where all of the L. C. L. freight from the Central Manufacturing District is handled. This building was entirely destroyed by fire on October 13th, 1920, since which time the greater portion of this business is being handled at the Terminal and Loft Building, leased property, at 39th and Robey Streets.

Leased L. C. L. station at Butler and 39th Streets.

Principal Structures Serving as Offices, Shops, etc.:

General office building 40th Street and Ashland Avenue, a modern two-story brick building.

Engine house and shops Ashland Avenue Yard—the house is a 34 stall brick round house with a new power house and stack in process of construction, a 100′ x 240′ brick machine shop, a 24 pocket timber coal chute and concrete wet ash pits.

Frame car repair shops at Racine Avenue and 47th Street.

Brick and frame storehouse and frame sheds at 39th Street material yard.

Principal Bridge Structures:

Mud Lake bridge over the West Fork South Branch Chicago River—a two track deck plate girder lift bridge;

Thru plate girder bridge 545 ft. long consisting of nine spans over Western Boulevard;

Swing bridges on Racine Avenue and Iron Street Branches over the Chicago River;

[fol. 190] A riveted truss span over the New York Central and Rock Island Railroads;

A concrete arch over the abandoned Illinois-Michigan canal.

A bascule lift bridge over the Drainage Canal, maintained by the Chicago Junction Railway at the expense of the Chicago Sanitary District, who own it.

Numerous minor bridges carrying the Railroad over streets. These are of the plate girder or I-beam type with solid floors. There are twenty-six on the 40th Street branch elevation and fourteen on the Campbell Avenue line elevation.

Telegraph lines are local circuit with no outside connections.

Non-carrier Property:

Two brick dwellings now used as factories in the vicinity of 16th Street.

(d) Each of said railroads has been operated prior to the date of the filing of the application herein made.

(e) Corporate history:

The Chicago Junction Railway Company:

This Railroad Company was incorporated under the Laws of the State of Illinois on the 11th day of February, 1904, and operation of said railroad was begun in 1908.

The Chicago Junction Railway Company:

This railroad company became incorporated as follows:

On September 30th, 1896, an agreement of consolidation was en-[fol. 191] tered into between the Hammond and Blue Island Railway Company of Indiana, and the Hammond and Blue Island Railroad Company of Illinois, forming the Hammond and Blue Island Railroad Company, whose railroad extended from Whiting, Indiana, to Blue Island, Illinois.

On the same date, viz., September 30th, 1896, an agreement of consolidation was entered into between the Chicago, Hammond and Western Railroad Company, a corporation organized on the 20th day of April, 1896, under the Laws of the State of Illinois, and said Hammond and Blue Island Railroad Company (which resulted from the consolidation last mentioned), forming the Chicago, Hammond and Western Railroad Company.

On January 1st, 1898, the Chicago, Hammond and Western Ra
road Company and the Chicago and Indiana State Line Railw
Company, a corporation organized under the laws of the State
Illinois, entered into an agreement of consolidation forming T
Chicago Junction Railway Company.

The Union Stock Yard and Transit Company of Chicago:

This company was incorporated on the 13th day of Februa
1865, by virtue of a special act of the legislature of the State
Illinois. Among its charter powers it was granted the right to c
struct and operate stock yards and to construct a railway with o
or more tracks, as may be expedient, from the grounds which m
be selected for its yards so as to connect with the tracks of all ra
roads which terminate in Chicago.

Pursuant to authority so given it The Union Stock Yard a
[fol. 192] Transit Company of Chicago constructed certain lines
railroad, and on December 15th, 1897, leased said lines of railro
to the Chicago and Indiana State Line Railway Company (pre
cessor, as hereinbefore described, of The Chicago Junction Railw
Company) for a term of fifty (50) years next ensuing after the d
of said lease, upon a rental reserved in the same of two-thirds of t
net earnings and revenue (as defined in the lease) for the full te
of the demise in said lease contained, derived by the Railway Co
pany from the operation of all of its lines of railroad and railro
tracks then owned or thereafter acquired, including the lines a
railroad of the Chicago, Hammond and Western Railroad Co
pany, which, as recited in said lease, was about to be consolida
with The Chicago and Indiana State Line Railway Company.

On October 31st, 1907, The Chicago Junction Railway Compa
by its certain deed conveyed to the Indiana Harbor Belt Railr
Company, a corporation organized and existing under the Laws
the State of Indiana, that portion of its certain lines of railroad f
merly belonging to the Chicago Hammond and Western Railro
Company (predecessor of The Chicago Junction Railway Company
The property so conveyed is now operated as part of the India
Harbor Belt Railroad as an outer belt line in the Chicago switchi
district and connects with the properties hereinbefore described n
owned and operated by The Chicago Junction Railway Company.

On the 1st day of December 1913, The Union Stock Yard a
Transit Company of Chicago and The Chicago Junction Railw
[fol. 193] Company entered into a certain indenture of lease wh
cancelled said indenture of lease dated December 15th, 1897, ma
between The Union Stock Yard and Transit Company of Chica
and the Chicago and Indiana State Line Railway Company, where
the properties demised by said former lease for a term of fifty (5
years were demised and leased in perpetuity to The Chicago Junct
Railway Company upon a rental reserved of $600,000 per year.

The Chicago Junction Railroad Company:

This is an independent corporation not to be confused with The Chicago Junction Railway Company, and the rights and interests of which are in nowise involved in the subject matters in respect of which application has been made to the Interstate Commerce Commission. It was organized primarily for the purpose of financing, pursuant to the requirements of a certain ordinance of the City of Chicago, dated the 16th day of March, A. D., 1903, the elevation of the railroad tracks and right of way located upon the so-called 40th Street Line of The Union Stock Yard and Transit Company of Chicago, included in the lease dated December 15th, 1897, made to the Chicago and Indiana State Line Railway Company. By agreement dated September 6th, 1903, made between The Union Stock Yard and Transit Company of Chicago, The Chicago Junction Railway Company, and The Chicago Junction Railroad Company, The Union Stock Yard and Transit Company of Chicago demised in perpetuity to The Chicago Junction Railroad Company so much of the southerly part of the so-called 40th Street right of way of The Union Stock Yard and Transit Company of Chicago lying between [fol. 194] the point midway between Prairie Avenue and Calumet Avenue and the East line of Lake Park Avenue in the City of Chicago, as is necessary for the construction, maintenance and operation of two railroad tracks after the completion and elevation thereof as herein mentioned; also, a right of way for a double track elevated railroad between the East line of Armour Avenue and a point 25 feet West of the West line of Union Avenue in the said City of Chicago; said elevated railroad to be constructed over and above the tracks of The Union Stock Yard and Transit Company of Chicago.

The rental reserved was a nominal sum of Ten Dollars ($10.00) a year and the performance by the Railroad Company of all of the requirements of the ordinance of March 16th, 1903 regarding the elevation of the tracks of The Union Stock Yard and Transit Company of Chicago. The Chicago Junction Railroad Company assigned to The Chicago Junction Railway Company all the rights, privileges and advantages provided for in said ordinance of March 16th, 1903, subject, however, to the right to use said double track elevated railroad and single track elevated loop for the conveyance of passengers.

The Chicago Junction Railroad Company, with the consent of The Chicago Junction Railway Company, leased said tracks to the South Side Elevated Railroad Company, which, by virtue of such lease made to it, is now operating over the elevated tracks constructed pursuant to the provisions of said agreement of September 6th, 1903.

[fol. 195] (f) Annual reports have been filed with the Interstate Commerce Commission by The Chicago River and Indiana Railroad Company for the fiscal year ending June 30th, 1908, and for every such fiscal year thereafter.

Annual reports have been filed with the Interstate Commerce Commission by The Chicago Junction Railway Company for the fiscal

year ending June 30th, 1910, and for every such fiscal year thereafter.

(g) Construction history:

Construction of the railroad lines of The Union Stock Yard and Transit Company of Chicago, which were eventually leased on December 15th, 1897, to the Chicago and Indiana State Line Railway Company and subsequently leased on December 1st, 1913 to The Chicago Junction Railway Company, was begun about 1865 on a line of railroad extending from Campbell Avenue, in the City of Chicago, easterly through the Stock Yards and 40th Street. About 1880 the Chicago and Indiana State Line Railway Company predecessor of the Chicago Junction Railway Company began construction of its line of railroad from a point at 31st Street, near the Chicago and Alton Railroad southerly through what is now the Central Manufacturing District to a connection with the railroad of The Union Stock Yard and Transit Company of Chicago at Racine Avenue, in Chicago. It also constructed a branch in the same district in Iron Street and the connection at the lower end of the Park Mains from 47th Street.

During the period from 1897 to 1913 and thus when the Chicago and Indiana State Line Railway Company and The Chicago Junc- [fol. 196] tion Railway Company were successive lessees of the railroad of The Union Stock Yard and Transit Company of Chicago, a large amount of heavy construction work was done in the extension of the lines of railroad of The Union Stock Yard and Transit Company of Chicago. The larger projects completed in this period were as follows:

Brighton Park track elevation.
49th Street track elevation.
Campbell Ave. track elevation.
Ashland Ave. track elevation.
Iron Street Bridge.
Racine Avenue Bridge.
40th Street track elevation.
47th St. track elevation.

All of this work was done by the lessee, and before determining the amount of rental reserved in the lease of December 15th, 1897, namely two-thirds of the net operating income, there was deducted from gross income, taxes, special assessments, operating expenses, etc., and in addition all moneys expended for new equipment, all moneys used in the construction of additions and betterments to the road and moneys to cover expenditures incurred by reason of public requirements such as track elevation (except in the instance of the 40th Street track elevation), which work was done by The Chicago Junction Railroad Company and towards the cost of which it became necessary for The Chicago Junction Railway Company to contribute approximately $500,000.

There are no records of cost prior to 1905, and since The Chicago Junction Railway Company or its predecessor virtually paid one

third and The Union Stock Yard and Transit Company of Chicago [fol. 197] two-thirds of the cost of the improvements made between 1905 and 1913 on the leased property and since from 1913 to the present date The Chicago Junction Railway Company has paid for all of the improvements on said leased property it is impossible to allocate a proportion of the value to the leased property.

General Characteristics of Physical Property:

The roadbed in the stock yard and industrial districts is on the same general level, constructed about 3 or 4 feet above the original ground surface. There are no appreciable grades in this section, except on the Park Mains from Exchange Avenue to Halstead Street, where the grade is about 1% and on the Main Line near the east entrance to the Ashland Avenue yard where the grade is 1.14%. On the outlet lines, however, which are generally elevated from 12 to 20 feet to cross at an elevated grade over the streets, there are the following ruling grades: Campbell Avenue Line—1% and 40th Street Line—1.4%, which is about 2,000 ft. long, extending between the Pennsylvania Railroad—Chicago and Western Indiana Railroad crossing and the New York Central Railroad—Chicago, Rock Island and Pacific Railroad crossing. The maximum grade on The Chicago River and Indiana Railroad is 1% except that on the approach to the crossing over the Pennsylvania Railroad and Baltimore and Ohio Railroad it is 2.4%, not compensated with an 11 degree curve. The maximum curvature on the outlet lines is about 15 degrees. However, through the stock yard and industrial territory there are [fol. 198] quite a few curves as sharp as a 200 radius. The rail consists principally of 80# Bessemer and 90# Open Hearth; connected with four bolt joints. The ties are mostly oak, except that within the past couple of years it has been necessary to install some ties of soft wood on account of the non-availability of oak. The track is ballasted principally with cinders in the yards and gravel on the mains.

The property in general is found to be fairly well maintained although there are spots here and there that may be considered a little below normal. There are unusual conditions to be overcome in the maintenance of the roadbed of this particular property, which is, more or less, special in character. There is a very large amount of traffic, records indicating that about 476,000 cars were handled during the year 919. This creates a particularly heavy wear and tear at the throats of the yards, which are largely maintained with manganese frogs and require special treatment at points of sharp curvature. Furthermore, tracks through the packing house district are subjected to considerable corrosion from the brine drippings. The bridges and buildings are found to be maintained up to a proper standard with a very few exceptions, among them being the old frame warehouse east of the slip on The Chicago River and Indiana Railroad waterfront property, which is in a dilapidated condition. The tools and equipment, although not of the most modern type, are generally in good condition.

(h) For a statement giving the details of any and all financial transactions involved in the application herein made the applicant respectfully refers to the certain agreement made between The Chi- [fol. 199 & 200] cago Junction Railways and Union Stock Yards Company and The New York Central Railroad Company dated September 27, 1920, a copy of which is hereto attached and made a part hereof, in which said agreement it is provided as follows:

"This agreement and the arrangements herein contemplated to be made shall not be binding unless approved pursuant to law by the Interstate Commerce Commission and by such other public authority, State or Federal, as may have jurisdiction in the premises, and unless counsel for the Vendee shall approve all titles, leaseholds, grants and other rights and interests here involved."

Reference is also made for a summary of said financial transaction to Section 5 of the application herein filed.

(i) For a statement of such other and further facts as the applicant may deem pertinent to show that the matters and things proposed and the granting of the application therefor will be in the public interest and in furtherance of public convenience and in discharge of public necessity, the applicant respectfully refers to Section 7 of the application herein filed, in which is made full statement in respect of the above matters and things.

The New York Central Railroad Company, By A. H. Harris, Vice-President.

Jurat showing the foregoing was duly sworn to by A. H. Harris omitted in printing.

[fol. 201] Copy of Certificate of Publication

State of Illinois,
County of Cook, ss:

D. M. Deininger, being duly sworn, says that he is Auditor and Comptroller of The Tribune Company, and is duly authorized to sign for said Company, owning and publishing the Chicago Tribune, a Daily Newspaper of general circulation, now and for more than six months prior to the date of first publication of the notice hereinafter mentioned, published regularly in said County, and that the notice of N. Y. Central R. R. of which annexed is a true copy, was printed and published in the regular edition and issue of said paper The Chicago Tribune, three (3) times, to wit: Jan. 7, 14, 21, 1921, the first publication being on the 7th day of Jan. 1921, and last on the 21st day of Jan. 1921.

Dated at Chicago, Ill., this 22nd day of Jan. 1921.

(Signed) D. M. Deininger.

Sworn and subscribed to before me this 22d day of January, 1921. (Signed) Alfred T. Ward, Notary Public. (Notarial Seal.)

[fol. 202]

Notice

Before the Interstate Commerce Commission

[Title omitted]

Public notice is hereby given pursuant to the regulations of the Interstate Commerce Commission of the following:

The New York Central Railroad Company has made application to the Interstate Commerce Commission for authority and for a certificate of public convenience, and necessity pursuant to the provisions of the Interstate Commerce Act in respect of the following:

(1) To enter into an agreement with The Chicago Junction Railways and Union Stock Yards Company providing:

[fol. 203] (a) That the New York Central Railroad Company shall purchase for the sum of $750,000 to be paid in cash or in such securities as the Vendor and Vendee shall agree upon, all of the capital stock of The Chicago River and Indiana Railroad Company.

(b) That the Chicago Junction Railway Company shall lease at an annual rental of $2,000,000, payable in quarterly installments of $500,000 each at the expiration of each quarter year during the term, except that the first two installments shall be for the sum of $250,000 each, for a term of ninety-nine (99) years, and thereafter at the election of the Lessee in perpetuity, to The Chicago River and Indiana Railroad Company all of its properties of every kind and character, including those held by it in lease under a certain indenture dated December 1, 1913, made between The Union Stock Yards and Transit Company of Chicago, as Lessor, and said The Chicago Junction Railway Company, as Lessee, and supplements thereto.

(c) That the New York Central Railroad Company be granted an option, to be exercised during the term of said lease, to purchase from either The Chicago Junction Railways and Union Stock Yards Company, a New Jersey Corporation, all of the capital stock of said The Chicago Junction Railway Company for the sum of $22,987,516 to be paid in cash or in such securities as the Vendor and Vendee shall agree upon, or to purchase from the respective owners thereof all of the properties of every kind and character and the reversionary interests therein of respectively The Chicago Junction Railway Company and The Union Stock Yard and Transit Company of Chicago, to be leased pursuant to the agreement for which approval is herein sought, by the Chicago Junction Railway Company to The Chicago River and Indiana Railroad Company, for [fol. 204] the sum of $33,333,333, payable in cash or in such securities as the Vendor and the Vendee shall agree upon, of which purchase price $2,987,516 is to be paid to The Chicago Junction Railway Company and $10,345,817 to The Union Stock Yard and Transit Company of Chicago.

(2) To each of the corporations above named, including said The New York Central Railroad Company, to execute all assignments, transfers, leases, deeds and other instruments and agreements necessary to make the transfers, leases and conveyances in said agreement provided for.

The New York Central Railroad Company. January 7, 1921.

[fol. 205] COPY OF CERTIFICATE OF PUBLICATION, PROOF OF PUBLICATION OF NOTICE

STATE OF INDIANA,
County of Lake, ss:

Before me, E. M. Goodland, Notary Public in and for said County of Lake and State of Indiana, this day personally came R. H. McHie, Agent, Secretary and Manager of the Lake County Printing and Publishing Co., a corporation of Hammond, Indiana, who being duly sworn, according to law, says that said corporation is the publisher of The Lake County Times, a Daily Newspaper of general circulation published in Hammond, Indiana, in said County, and that the notice, of which the annexed is a true copy, was published in said paper on the 7th day of January, 1921, the 14th day of January, 1921, and the 21st day of January, 1921. That this affiant is authorized to make this affidavit and knows said facts to be true.

(Signed) R. H. McHie.

Subscribed and sworn to before me this 21st day of January, 1921. (Signed) E. M. Goodland, Notary Public. My commission expires August 25, 1923. (Notarial Seal.)

[fol. 206] NOTICE

Before the Interstate Commerce Commission

[Title omitted]

Public notice is hereby given pursuant to the regulations of the Interstate Commerce Commission of the following:

The New York Central Railroad Company has made application to the Interstate Commerce Commission for authority and for a certificate of public convenience and necessity pursuant to the provisions of the Interstate Commerce Act in respect of the following:

(1) To enter into an agreement with The Chicago Junction Railways and Union Stock Yards Company providing:

(a) That the New York Central Railroad Company shall purchase for the sum of $750,000 to be paid in cash or in such securi-

[fol. 207] ties as the Vendor and Vendee shall agree upon, all of the capital stock of The Chicago River and Indiana Railroad Company.

(b) That the Chicago Junction Railway Company shall lease at an annual rental of $2,000,000, payable inquarterly installments of $500,000 each at the expiration of each quarter year during the term, except that the first two installments shall be for the sum of $250,000 each, for a term of Ninety-nine (99) years, and thereafter at the election of the Lessee in perpetuity, to The Chicago River and Indiana Railroad Company all of its properties of every kind and character, including those held by it in lease under a certain indenture dated December 1, 1913, made between The Union Stock Yard and Transit Company of Chicago, as Lessor, and said The Chicago Junction Railway Company, as Lessee, and supplements thereto.

(c) That The New York Central Railroad Company be granted an option, to be exercised during the term of said lease, to purchase either from The Chicago Junction Railways and Union Stock Yards Company, a New Jersey corporation, all of the capital stock of said The Chicago Junction Railway Company for the sum of $22,987,516 to be paid in cash or in such securities as the Vendor and Vendee shall agree upon, or to purchase from the respective owners thereof all of the properties of every kind and character and the reversionary interests therein of respectively The Chicago Junction Railway Company and The Union Stock Yard and Transit Company of Chicago, to be leased pursuant to the agreement for which approval is herein sought, by The Chicago Junction Railway Company to The Chicago River and Indiana Railroad Company, for the sum of $33,333,333, payable in cash or in such securities as the Vendor and the Vendee shall agree upon, of which purchase price [fols. 208-211] $22,987,516 is to be paid to The Chicago Junction Railway Company and $10,345,817 to The Union Stock Yard and Transit Company of Chicago.

(2) To each of the corporations above named, including said The New York Central Railroad Company, to execute all assignments, transfers, leases, deeds and other instruments and agreements necessary to make the transfers, leases, and conveyances in said agreement provided for.

The New York Central Railroad Company. January 7, 1921. 1:7:14:21.

[fol. 212] AGREEMENT BETWEEN THE CHICAGO JUNCTION RAILWAYS AND UNION STOCKYARDS COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY—Dated September 27th, 1920

[fol. 213] This agreement made this 27th day of September, 1920, by and between the Chicago Junction Railways and Union Stock Yards Company, a corporation organized and existing under and

by virtue of the Laws of the State of New Jersey (hereinafter called the Vendor) party of the first part, and The New York Central Railroad Company, a corporation organized and existing under the Laws, among other states, of the State of Illinois (hereinafter called the Vendee) party of the second part,

Witnesseth:

Whereas, the Vendor owns all of the capital stock of The Chicago Junction Railway Company, a corporation organized and existing under the Laws of the State of Illinois, owning and operating certain railroad lines in the County of Cook and State of Illinois and, also, all of the capital stock of The Union Stock Yard and Transit Company of Chicago, a corporation organized and existing under the Laws of the State of Illinois, owning, among other properties, certain railroad lines located in the County of Cook and State of Illinois, all of which shares of stock are pledged under and subject to the terms and provisions of a certain Mortgage and Deed of Trust dated April 10th, 1900, made by the Vendor to The Standard Trust Company of New York, Trustee, to which Guaranty Trust Company of New York is Successor in Trust; and

Whereas, the Vendor owns fifty (50) per cent and certain individuals own the remaining fifty (50) per cent of the capital stock of The Chicago River and Indiana Railroad Company, a corporation organized and existing under and by virtue of the Laws of the State of Illinois, owning and operating certain lines of railroad located in Cook County, Illinois, connecting with the lines of railroad of The Chicago Junction Railway Company; and

[fol. 214] Whereas, the Vendor desires that all of the capital stock of said The Chicago River and Indiana Railroad Company shall be sold and conveyed to the Vendee and the Vendee desires to purchase the same; and

Whereas, said individual stock-holders of said The Chicago River and Indiana Railroad Company are willing to sell and convey their stock-holding interests to the Vendee; and

Whereas, the Vendor also desires that the railroad properties and appurtenances of said The Chicago Junction Railway Company shall, in conjunction with the sale and conveyance of said capital stock of The Chicago River and Indiana Railroad Company, be leased either to said The Chicago River and Indiana Railroad Company or to the Vendee; and

Whereas, it will be in the public interest and to the mutual benefit of the parties hereto and of the several railroad companies herein referred to that the sales, conveyances and leases herein provided for shall be made upon the terms and provisions herein contained;

Now, therefore, in consideration of the premises it is agreed by and between the parties hereto as follows:—

1. Within thirty (30) days after approval of this contract and of the several transactions herein contained by the Interstate Commerce Commission and such other public authorities as shall have jurisdiction in the premises the Vendor will sell, transfer and deliver and will cause to be sold, transferred and delivered to the

Vendee or its nominee free and clear of all liens the entire outstanding capital stock of said The Chicago River and Indiana Railroad Company, being Five thousand (5,000) shares of the par value of One Hundred Dollars ($100.00) each, for the sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00), and the Vendee [fol. 215] agrees to purchase the same. The said Seven Hundred and Fifty Thousand Dollars ($750,000.00) shall be paid in cash or in such securities as the Vendor and Vendee shall agree upon and simultaneously with the transfer and delivery of said stock to the Vendee or to its nominee.

The above contract of sale and purchase is made on and subject to the following conditions:—

Before the purchase price herein provided for of said capital stock shall be paid by the Vendee the Vendor shall make showing satisfactory to Counsel of the Vendee and shall guarantee to the Vendee that the railroad properties and appurtenances of said The Chicago River and Indiana Railroad Company are free and clear of all liens, encumbrances, debts, contract, trackage and leasehold obligations and all other liabilities except the certain lien evidenced by the certain Trust Deed dated October 1, 1911, made by The Chicago River and Indiana Railroad Company to The Merchants Loan and Trust Company, Trustee, and the supplemental indenture thereto, dated July 1, 1915, made between the same parties and the debt secured thereby evidenced by certain issues of bonds with current interest thereon of The Chicago River and Indiana Railroad Company of which there are now outstanding in the aggregate bonds amounting to Seven Hundred and Sixty-five Thousand Dollars ($765,000.00), and, except as specified in Exhibit "A," hereto attached, which is made a part of this agreement; provided that the Vendor will pay or cause to be paid by said The Chicago River and Indiana Railroad Company such portion of all taxes and assessments of every kind and character charged to said Railroad Company, or levied upon its properties, which shall have accrued at the time of the transfer of said stock or shall be levied for the calendar year in which it is made, and of interest upon its bonds and of all obligations specified in said Exhibit "A," as shall be equitably apportionable to the period preceding the date upon which said capital [fol. 216] stock of said The Chicago River and Indiana Company shall be transferred to the Vendee, to the end that the Vendee's interests in the properties of said The Chicago River and Indiana Railroad Company shall bear only their pro rata share of all such obligations.

The Vendor further covenants to protect and save the Vendee harmless from all claims, demands and liabilities of every kind and character against The Chicago River and Indiana Railroad Company relating to its property or appurtenances other than such as may be based upon the mortgage and bonds above specified, or upon indebtedness, rentals or other obligations listed in said Exhibit "A" arising prior to the date upon which said capital stock of said The Chicago River and Indiana Railroad Company shall be conveyed to the Vendee, as herein provided for.

Any monies which said The Chicago River and Indiana Railroad Company may have on hand, or which may be due to it at the time of the transfer of said stock, shall be applied, so far as may be necessary, to the payment of any such debts, obligations or other liabilities other than that represented by the principal of the mortgage bonds above referred to.

The Vendor at the option of the Vendee, to be exercised prior to or simultaneously with the delivery of said stock of The Chicago River and Indiana Railroad Company, will cause said The Chicago River and Indiana Railroad Company to enter into a lease with said The Chicago Junction Railway Company whereby all of the railroad properties and appurtenances owned by said last mentioned Railway Company and, also, all the certain properties leased to it, particularly described in the certain lease dated December 1, 1913, wherein said The Union Stock Yard and Transit Company of Chicago is Lessor and said The Chicago Junction Railway Company is Lessee, and leases supplementary thereto, and which are now operated by it, will be demised and leased to said The Chicago River and Indiana Railroad Company. Such proposed lease shall be in [fol. 217] form approved by Counsel for the Vendor and Vendee and shall be for a term of Ninety-nine (99) years, and renewable in perpetuity thereafter at the option of the Lessee, beginning on the first day of the month following the date of approval of said lease by the Interstate Commerce Commission, at an annual rental of Two Million Dollars ($2,000,000.00), payable in quarterly installments at the expiration of each quarter year during the term, except that the first two installments shall be for the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00) each instead of Five Hundred Thousand Dollars ($500,000.00) each, provided that the Lessee shall be entitled to deduct (and said lease shall so provide) from the quarterly installments or rent to be reserved in said lease, as herein provided, pro rata amounts sufficient to aggregate annually Six Hundred and Twenty Thousand, Seven Hundred and Forty-nine Dollars ($620,749.00), being the annual amount of rent reserved under said lease dated December 1, 1913, and supplements thereto, made between The Union Stock Yard and Transit Company of Chicago and The Chicago Junction Railway Company, and thereupon to pay direct to the Lessor thereunder, on behalf of The Chicago Junction Railway Company the installments of rent reserved therein as and when they shall fall due.

Said lease shall also provide that the Lessee therein shall pay all taxes and assessments, Federal, State, County and Municipal (except those personal to the Lessor), which are or may become liens on the leased property, provided that The Union Stock Yard and Transit Company of Chicago shall covenant to pay in the first instance all of said taxes (except special assessments identified with specific pieces of property) properly chargeable to the railroad properties and appurtenances leased by said Company to The Chicago Junction Railway Company under the terms of said lease dated December 1, 1913 [fol. 218] and supplements thereto, with the understanding that said The Chicago River and Indiana Railroad Company, as Lessee,

upon proper bills rendered, shall reimburse said The Union Stock Yard and Transit Company of Chicago for the amount of all such taxes from time to time so paid by it. The taxes properly chargeable to said railroad properties and appurtenances shall be deemed to amount to 41% of the sum of all taxes (except special assessments of those personal to The Union Stock Yard and Transit Company of Chicago) from time to time assessed and levied upon all the properties of said Company, including said railroad properties and appurtenances demised under the terms of said lease dated December 1, 1913.

In the event that additions, betterments or alterations made either to the railroad properties and appurtenances demised under said lease of December 1, 1913, or to other properties of said The Union Stock Yard and Transit Company of Chicago shall make said ratio for dividing taxes inequitable as between said The Union Stock Yard and Transit Company of Chicago and said The Chicago River and Indiana Railroad Company, then upon request of either of said parties the same shall be revised to a ratio that shall equitably reflect the altered situation in relative values.

If, at any time during the term of said lease, either party to the above arrangement providing for paying taxes shall regard the same as affecting its interests injuriously, then it shall have the right, upon serving sixty (60) days' notice in writing upon the other party, to terminate the same and thereafter the Lessee shall pay all taxes assessed and levied upon said railroad properties and appurtenances demised under said lease dated December 1, 1913.

Said lease shall further provide that the Lessee thereunder shall operate and maintain the properties leased during the term thereof, and as sub-lessee under said lease dated December 1, 1913, shall be entitled, in lieu of The Chicago Junction Railway Company, Lessee [fol. 219] thereunder, to enter upon, occupy and use the premises therein demised and to exercise all the rights and privileges therein granted, provided that in respect of the following grant therein contained to-wit:

"* * * the right to lay down, maintain and operate upon the lands of the Yards additional side tracks, switch tracks, industrial tracks, switches, connections, cross-overs, and appurtenances thereof, necessary to reach industrial plants now or hereafter erected; with the right to rearrange, remove, and replace existing yards, side tracks, switch tracks, industrial tracks, switches, connections, and cross-overs, and the same to change, alter and renew at pleasure and the right to erect such depots and stations as may be reasonable and necessary."

said Lessee shall exercise the same subject to approval by said The Union Stock Yard and Transit Company of Chicago as to location and plan for any such addition, improvement or rearrangement, to the end that the exercise thereof shall not interfere with the efficient and economical operation of the properties of said The Union Stock Yard and Transit Company of Chicago, as they now exist. The fore-

going provision shall not be deemed to limit in any respect any right at any time existing in said Lessee to condemn or otherwise appropriate property for its purposes pursuant to Law.

The Vendee will guarantee the performance by the Lessee, The Chicago River and Indiana Railroad Company, of all covenants undertaken by it in said lease contained, and to make effective this provision will, upon the execution of said lease, place its appropriate guarantee thereon, as herein provided.

Upon the making of said lease the Vendor shall make showing satisfactory to Counsel for the Vendee, and the Lessor shall covenant that the properties of said The Chicago Junction Railway Company [fol. 220] and of said The Union Stock Yard and Transit Company of Chicago, so to be leased, are owned by them respectively in fee simple, except as specified in Exhibit "B" hereto attached, and are free and clear from all liens, encumbrances, debts, contract, trackage and leasehold obligations and all other liabilities except as specified in said Exhibit "B," provided that the Vendor shall see to it and the Lessor shall covenant that it, the Lessor, will pay such portion of all taxes and assessments levied upon its properties which shall have accrued at the beginning of the term of said lease or shall be levied for the calendar year in which such term shall begin, and of all obligations specified in said Exhibit "B," as shall be equitably apportionable to the period preceding the beginning of the term of said lease, to the end that the Lessee shall be charged with only its pro rata share of all such taxes and other obligations.

Said Lessor shall also covenant that during the term of said lease it will not, except as hereinafter provided, place upon said properties, or any portion thereof, any lien or encumbrance of any kind or character, and the Vendor, as the owner of all of the capital stock of said The Chicago Junction Railway Company and of said The Union Stock Yard and Transit Company of Chicago, hereby agrees that it will not vote said stock or any portion thereof, at any stock-holders' meeting or take any other action in furtherance of any such purpose.

Any monies which said The Chicago Junction Railway Company may have on hand, or which may be due to it at the time of the making of said lease, shall be applied, so far as may be necessary, to the payment of any such debts, obligations or other liabilities.

The Vendor covenants that it will not sell, assign or transfer, except to the Vendee, as hereinafter provided, the stock, or any portion thereof, of said The Chicago Junction Railway Company during the term of said lease, or of any extension thereof, that during said period [fol. 221] it will not by affirmative vote or by abstaining from voting or in any other manner, directly or indirectly, sanction or permit any increase of said capital stock, and that it will not pledge, mortgage or otherwise encumber the same except subject to the right of purchase thereof by the Vendee, as hereinafter provided, and that if there shall be any lien upon said stock or any other obligation against the same at the time that said right of purchase shall be exercised then, that the amount thereof shall be deducted from said purchase price; that said The Chicago Junction Railway Company shall not incur any indebtedness, obligation or other liability of any kind or

character during the term of said lease without the consent of the Vendee, and that if, with the Vendee's consent, such indebtedness, obligation or other liability shall be incurred, the amoun thereof existing or outstanding at the time the Vendee shall exercise its right to purchase the stock of said The Chicago Junction Railway Company as hereinafter provided, may be deducted from the purchase price thereof.

If the Vendee shall elect that a lease as aforesaid shall not be made between said The Chicago River and Indiana Railroad Company and said The Chicago Junction Railway Company, then the Vendee hereby covenants and agrees that at the time of the conveyance and delivery to it of the capital stock of The Chicago River and Indiana Railroad Company and of the payment of the purchase price by it, as hereinbefore provided, the Vendee will enter into a lease with The Chicago Junction Railway Company for the properties aforesaid upon the same terms, conditions and covenants as above provided for the lease proposed to be made between said The Chicago River and Indiana Railroad Company and said The Chicago Junction Railway Company.

Either of the leases aforesaid shall be subject to all of the terms and conditions of the said lease made as aforesaid between said The Union Stock Yard and Transit Company of Chicago and said The [fol. 222] Chicago Junction Railway Company, dated December 1, 1913, and the supplements thereto, except as herein otherwise provided.

2. The Vendee shall have the right during the term of the lease herein provided for, and of any extension thereof, to purchase from the Vendor the entire capital stock now issued and outstanding of said The Chicago Junction Railway Company, being Fifty-five thousand (55,000) shares of the par value of One Hundred Dollars ($100.00) each, and now pledged under said Mortgage and Deed of Trust and Supplemental Indenture thereto, made by the Vendor to The Standard Trust Company of New York, Trustee, Guaranty Trust Company of New York, Successor in Trust, whenever said stock can be released from said Mortgage and Supplemental Indenture thereto and the Vendee, if and when it exercises its right to acquire said stock shall pay therefor the sum of Twenty-two Million Nine Hundred and Eighty-seven Thousand Five Hundred and Sixteen Dollars ($22,987,516.00).

The said purchase price shall be paid in cash or in such securities as the Vendor and Vendee shall agree upon, and at the time of the sale and transfer of said stock to the Vendee or its nominee the Vendor will make showing to the satisfaction of Counsel of the Vendee and will covenant that said stock and the properties and appurtenances of said The Chicago Junction Railway Company are free and clear of all liens and encumbrances except as specified in Exhibit "B," hereto attached, or created as herein provided.

If the Vendee upon becoming the owner of the capital stock of The Chicago Junction Railway Company shall determine that the said lease of its properties to be made as herein provided to The

Chicago River and Indiana Railroad Company, or to the Vendee, shall be cancelled, then the Vendee shall thereupon become obligated to pay the rents and perform all of the conditions of the lease be- [fol. 223] tween The Union Stock Yard and Transit Company of Chicago and The Chicago Junction Railway Company, made as aforesaid, dated December 1, 1913, and of the leases supplemental thereto except as herein otherwise provided.

3. The Vendee or its nominee shall also have the right, at any time, to purchase all of the franchises, lands, leaseholds, trackage rights, equipment and all other railroad properties and appurtenances owned by said The Chicago Junction Railway Company and, also, all the properties leased to it by said The Union Stock Yard and Transit Company of Chicago under its said lease dated December 1, 1913, and leases supplemental thereto, and now operated by it, for the sum of Thirty-three Million Three Hundred and Thirty-three Thousand, Three Hundred and Thirty-three Dollars ($33,333,333.33), payable in cash or in such securities as the Vendor and the Vendee shall agree upon, and the Vendor covenants that upon the exercise by the Vendee of the right of purchase herein provided for it will cause The Chicago Junction Railway Company and The Union Stock Yard and Transit Company of Chicago to execute and to deliver to the Vendee or to its nominee such deeds and other instruments as will effectively convey all the properties and interests above described to be so purchased by the Vendee.

The Vendor further covenants that the properties so to be conveyed shall be free and clear of all liens, encumbrances and other liabilities except such as are specified in Exhibit "B" hereto attached, or shall hereafter be created or placed upon the same by the Vendee or with its consent in writing, and if, at the time of the conveyance of said properties, any liens, encumbrances or other obligations shall exist upon the same except as specified above the amount thereof shall be deducted from the purchase price herein provided for.

The Vendee shall, by covenants in such instruments of conveyance contained, assume and agree to perform all the obligations imposed on either The Union Stock Yard and Transit Company of [fol. 224] Chicago or The Chicago Junction Railway Company in respect of the properties so to be conveyed thereby by any of the instruments or items enumerated in said Exhibit "B," or hereafter incurred pursuant to the provisions of this agreement by either of said corporations in connection with the upkeep or operation of said properties or imposed on either of said corporations by any ordinances (present or future) of the City of Chicago or other public body affecting or relating to said properties.

The Vendee shall pay of said purchase price Twenty-two Million Nine Hundred and Eighty-seven Thousand, Five Hundred and Sixteen Dollars ($22,987,516.00) to The Chicago Junction Railway Company and Ten Million, Three Hundred and Forty-five Thousand Eight Hundred and Seventeen Dollars ($10,345,817.00) to The Union Stock Yard and Transit Company of Chicago.

4. The Vendor, The Chicago Junction Railway Com-any and The Union Stock Yard and Transit Company of Chicago shall each, at the request of the Lessee under the lease herein provided for, take such corporate action from time to time as may be necessary or appropriate in the acquisition of property or in any other matters incident to the organization, maintenance or operation of the properties to be leased as in said lease herein provided, and the Vendor shall, as owner of all of the capital stock of The Chicago Junction Railway Company and of The Union Stock Yard and Transit Company of Chicago, see to it that all of the engagements hereunder to be performed by it, by The Chicago Junction Railway Company and by The Union Stock Yard and Transit Company of Chicago shall be fully and effectively carried out.

5. This agreement and the arrangements herein contemplated to be made shall not be binding unless approved pursuant to law by the Interstate Commerce Commission and by such other public au- [fol. 225] thority, State or Federal, as may have jurisdiction in the premises, and unless counsel for the Vendee shall approve all titles, leaseholds, grants and other rights and interests here involved.

The parties hereto, however, agree to use their best endeavors to obtain approval of the same by each and all public authorities. The Vendee agrees to make application for such approval to the Interstate Commerce Commission and to such other public authorities as it may be advised are necessary prior to November 1, 1920.

Maps marked Exhibits "C," "D" and "E," identified and authenticated by the signatures of the respective Chief Engineers of the parties hereto, are made a part hereof, showing respectively the Railroad properties of The Chicago River and Indiana Railroad Company, The Chicago Junction Railway Company and the certain properties of The Union Stock Yard and Transit Company of Chicago, leased to The Chicago Junction Railway Company under the said lease dated December 1, 1913, and supplements thereto, and indicating, in respect of each of said railroad properties, by separate colors, properties held in fee, by lease, by trackage right, by easement and by any other form of user and the several portions of said respective railroads subject to lease trackage right, easement and any other form of user.

It is agreed herein that the extent and the nature of the holdings, subject to the provisions of this agreement of said respective Railroad Companies, are substantially as shown upon said Exhibit "C," "D" and "E."

This agreement shall extend to and be binding upon the respective successors and assigns of the Vendor and Vendee.

If any items constituting obligations of either The Chicago River and Indiana Railroad Company or The Union Stock Yard and Transit Company of Chicago or The Chicago Junction Railway Company, or constituting liens or encumbrances on said properties, which [fols. 226–230] should properly have been included in said Exhibits "A" or "B," have been inadvertently omitted therefrom, they may nevertheless be hereafter inserted therein, and if any items which

are included therein should not properly be there they may be hereafter omitted.

In witness whereof, the parties have caused this agreement to be executed in their respective corporate names by their respective officers duly authorized and their respective corporate seals to be hereto affixed and attached by their respective secretaries the day and year first above written,

The Chicago Junction Railways and Union Stock Yards Company, By George P. Gardner, Vice-President. Attest: Martin A. Taylor, Secretary. [Corporate Seal.] The New York Central Railroad Company, By A. H. Smith, President. Attest: E. F. Stephenson, Secretary. [Corporate Seal.]

Jurats showing the foregoing was duly sworn to by Geo. P. Gardner and Martin A. Taylor and A. H. Smith and E. F. Stephenson omitted in printing.

[fol. 231] EXHIBIT "A" TO AGREEMENT

A tabulation of all liens, encumbrances, debts, contract obligations, leasehold obligations, trackage obligations, and all other obligations, relating to the railroad properties, and appurtenances of the Chicago River and Indiana Railroad Company—not including current operating expenses except those herein specified.

I

Funded Debt

(a) Bond issue of October 1, 1911, and supplemental agreement of July 1, 1915, with the Merchants Loan & Trust Company, Trustee, covering an issue of $765,000.00 First Mortgage 5% Gold Bonds, maturing October 1, 1925.

II

Equipment Obligations

(a) Loan Price Agreement between the Chicago River & Indiana Railroad and Chicago Junction Railway, providing that the former will assume the payments for four (4) of the fourteen (14) locomotives allocated to the Chicago Junction Railway under the Equipment Trust Agreement between the Chicago Junction Railway Company, Director General of Railroads, and the Guaranty Trust Company of New York, Trustee, dated January 15, 1920. The total payment of this loan price aggregates a maximum of $126,428.57. This amount is payable in equal installments, due July 15, 1920, and semi-annually thereafter. The payment due July 15, 1920, has been paid by the Chicago River & Indiana Railroad Company.

(Here follow tables marked side folio pages 231½ and 232.)

Lessor	Lessee	Note	Date
Nessen Warehousing Co.	C. R. & I. R. R.	(1)	Nov. 20, 1911
Illinois Central R. R.	C. R. & I. R. R.	(2)	Nov. 28, 1917
B. & O. C. T. R. R.	C. R. & I. R. R.	(3)	Jan. 2, 1912
A. T. & S. F. Ry.	C. R. & I. R. R.	(4)	Nov. 28, 1917

NOTE (1).—This is a sublease of a portion of the premises leased b
from the Sanitary District of Chicago under date of December 1, 1906.
NOTE (2).—This is a lease from the Santa Fe and Illinois Central, j
NOTE (3).—This agreement is a renewal of an agreement made Janu
for 10 years from January 20, 1905, and was renewed for 99 years fro
NOTE (4).—This is the same lease as noted in Note 2.

[fol. 232]

T

Grantor	Grantee	Date	Expiration
A. T. & S. F. Railway	C. R. & I. R. R.	Jan. 1, 1909	Dec. 31, 193 and there after
C. J. Railway	C. R. & I. R. R.	Jan. 1, 1909	99 years.
A. T. & S. F. Railway	C. R. & I. R. R.	Jan. 1, 1913	(Supplemental Agreemen to lease, dated January 1 1909, first above enumerated.
P. C. C. & St. L.	C. R. & I. R. R.	Dec. 13, 1911	20 years.
I. H. B. R. R.	C. R. & I. R. R.	Nov. 16, 1914	Aug. 20, 198

(a) Track Ordinance Easement City of Chicago to this company; no
Street and alleys. See permit of October 6, 1909, granted by the City of Ch
(b) Track Ordinance Easement City of Chicago to this company, dat
Avenue; ordinance issued to Chicago Refrigerator Car Company; this con
(c) Track Ordinance Easement City of Chicago to this company; no
across 48th Place and alleys.
(d) Track Ordinance Easement City of Chicago to this company, dat
Street; permit issued to Chicago Brick Company; this company assumes p

NOTE.—The items mentioned in the foregoing subdivisions are shown

old and Easement Obligations

Expiration	Annual Rental	Premises	Remarks
Dec. 31, 1956	$5,162.50	Nessen Warehouse Property 37th and Robey Streets...	Lessee pays taxes. Area 14.75 acres .....
90 days' notice	6.00	Land in Elevator Yard	90 days' cancellation either party. Area 405 sq. ft. Lessee pays taxes.
Jan. 2, 2011	20.00	43rd and 49th Sts.	May cancel after expiration on 90 days' notice.
90 days' notice	21.00	Land near Leavitt St. Yard..	.....

d by the Nessen Company through an Assignment from the Chicago Title & Trust Company

l, joint owners.
anuary 20, 1905, between the B. & O. R. R. and Union Stock Yards & Transit Co., which ran from January 12, 1912.

IV

Trackage Obligations

tion	Basis of Charge	Premises	Remarks
1933 here-	$7,500.00 per annum	Elevator Yard Tracks and Slip Property, 27th and Robey Sts.	Lessee pays taxes. 5-year cancellation notice after Dec. 31, 1933.
....	37½ cents per car handled over line.		
.... ment y 1, ted.)	$970.68 per annum.	Elevator Yard Tracks and Slip Property 27th and Robey St.	Lessee pays taxes. 5-year cancellation notice after Dec. 31, 1933.
.....	37½ cents per car handled over line.	South or west side of P. C. C. & St. L. tracks between Drainage Canal and 49th street connection with the B. & O. C. T.	Subject to cancellation 1-year notice either party, providing the P. C. C. & St. L. provides its own freight house facilities.
1986	Wheelage	49th Street Line	No bill ever rendered and no charge paid; seldom used.

V

Other Obligations

; no record of ordinance; no record of expiration; annual rental $244.00; tracks across 48th of Chicago.
dated April 13, 1910; no record of expiration; annual rental $33.00; tracks across Kedzie s company assumes the payment.
no record of date of ordinance; no record of date of expiration; annual rental $198.98; tracks

dated June 10, 1910; expiration June 10, 1930; annual rental $118.00; tracks across 43rd nes payment.
own separately as a matter of convenience. Some of them are also included under subdivision

18	45	Dec.	10, 1904	U. S. Y. & T. Co.	.....	Construction of tracks.
19	50	May	10, 1905	C. J. Ry. Co.	.....	Lease, Union Freight Station.
20	52	Oct.	21, 1913	B. & O. C. T. R. R. Co.	.....	Letter re reaching Patent Vulcanite Roofing Co. via B. & O. C. T.
21	53	Jan.	17, 1905	"	"	Contract, C. J. Ry Co., Interlocking Plant.
22	54	Oct.	1, 1913	A. T. & S. F. Ry. Co., et al.	.....	Switch engine, Crane Co.'s plant.
23	62	Nov.	28, 1916	Lake Bldg. Material Co.	.....	Construction, track at 49th and Leavitt Sts.
24	64	April	6, 1911	Canners Can Co. (Wilson Steel Products Co.)	....	Track, 49th and Western Ave.
25	72	Jan.	16, 1912	Brunswick, Balke, Collender Co.	.....	Track, 45th and Western Ave.
26	29	Nov.	1, 1913	U. S. Y. & T. Co.	.....	Lease, land occupied by Swift & Co.

Various Contracts, Agreements and Other Obligations Entered Into by the Chicago River & Indiana Railroad Company

Item No.	File No.	Date	With whom made	Remarks
1	3	Dec. 30, 1911	P. C. C. & St. L. Ry. Co.	Trackage rights.
2	4	Oct. 6, 1904	" " "	
3	5	Nov. 18, 1908	I. H. B. R. R. Co.	Crossing 47th St. Contract with C. J. Ry. Co.
4	5	Nov. 16, 1914	" "	Trackage rights, main line.
5	5	Nov. 16, 1914	" "	Trackage rights, 49th St.
6	8	Nov. 20, 1911	Nessen Warehousing Co.	Trackage rights, Brighton Park.
7	10	Aug. 8, 1912	Chicago Bearing Metal Co.	Lease Sanitary District.
8	12	Jan. 1, 1909	A. T. & S. F. Ry. Co.	Track 45th St. and Western Ave.
9	13	Jan. 1, 1909	" " "	Lease Property 27th St. and the River.
10	15	July 1, 1912	Chicago Title & Trust Co.	Trackage agreement.
11	16	Jan. 1, 1909	U. S. Y. & T. Co., et al	Right of way west of P. C. C. & St. L. tracks.
12	18	July 1, 1912	A. G. Leonard	Trackage agreement.
13	23	June 25, 1910	Chicago City Ry. Co.	Track rights west of P. C. C. & St. L. Ry. Co.
14	28	June 13, 1913	Ill. Northern R. R. Co.	Crossing 49th St. and Kedize Ave.
15	39	Jan. 20, 1905	B. & O., B. & O. C. T. R. R. Co., et al	Use of I. N. tracks 38th and 47th Sts.
16	40	Sept. 20, 1909	A. T. & S. F. Ry. Co.	Trackage agreement.
17	42	March 7, 1911	Brunswick, Balke, Collender Co.	Track connection, 49th St.
18	45	Dec. 10, 1904	U. S. Y. & T. Co.	Track, Western Ave. property.
19	50	May 10, 1905	C. J. Ry. Co.	Construction of tracks.
20	52	Oct. 21, 1913	B. & O. C. T. R. R. Co.	Lease, Union Freight Station.
21	53	Jan. 17, 1905	" " "	Letter re reaching Patent Vulcanite Roofing Co. via B. & O. C. T.
22	54	Oct. 1, 1913	A. T. & S. F. Ry. Co., et al	Contract, C. J. Ry Co., Interlocking Plant.
23	62	Nov. 28, 1910	Lake Bldg. Material Co.	Switch engine, Crane Co.'s plant.
24	64	April 6, 1911	Canners Can Co. (Wilson Steel Products Co.)	Construction, track at 49th and Leavitt Sts.
25	72	Jan. 16, 1912	Brunswick, Balke, Collender Co.	Track, 49th and Western Ave.
26	79	Nov. 1, 1913	U. S. Y. & T. Co.	Track, 45th and Western Ave.
				Lease, land occupied by Swift & Co.

Various Contracts, Agreements, Etc.—*Continued*

Item No.	File No.	Date	With whom made	Remarks
27	101	March 18, 1916	G. T. System, et al	Gates, 49th St. and Kedzie Ave.
28	109	Oct. 3, 1916	Shane-Mason Co., Inc. (Assigned to Montana Flour Mills Co., October 1, 1919)	Lease at 27th and Robey.
29	112	June 20, 1910	City of Chicago	Crossing, 43rd St.
30	113	Nov. 1, 1916	I. H. B. R. R. Co.	Use I. H. B. rails, Oakley Ave. and Morgan St.
31	115	Jan. 20, 1916	B. & O. C. T. R. R. Co., et al	Crossing protection, 49th St.
32	123	July 24, 1917	I. H. B. R. R. Co.	Lamp, 49th and Kedzie Ave.
33	129	Nov. 28, 1917	A. T. & S. F. Ry. Co., et al	Lease, ground 31st and Leavitt Sts.
34	135	April 1, 1918	P. C. C. & St. L. Ry. Co.	Joint switching arrangement.
35	136	May 11, 1918	Jones & Laughlin Steel Co.	Driveway, 45th Pl. and Western Ave.
36	138	June 8, 1920	C. T. H. & S. E. Ry. Co.	Lease of C. R. & I. Engine No. 301.
37	148	April 15, 1919	Melville Clark Piano Company	Track, 48th Pl. and Kedzie Ave.
38	149	May 15, 1919	Central Lime & Cement Company	Track, 49th and Whipple Sts.
39	150	May 15, 1919	Union Insulating Co.	Track, 47th and Whipple Sts.
40	151	May 15, 1919	Cleveland Metal Products Company	Track, 43rd St. and Western Ave.
41	152	(Not executed)	Marshall Field & Co.	Track, 47th and Whipple Sts.
42	153	June 16, 1919	Jones & Laughlin Steel Co.	Track, 47th and Leavitt Sts.
43	154	Aug. 1919	Duffin Iron Co.	Track, 49th St. and Kedzie Ave.
44	157	Nov. 21, 1919	Amer. Fdy. & Equip. Co.	Track, 47th and Richmond Sts.
45	158	Jan. 2, 1919	Pere Marquette Ry. Co.	Sewer, 43rd and Leavitt Sts.
46	160	Dec. 1, 1919	Ideal Coated Paper Co.	Track, 43rd St. and Western Ave.
47	161	Dec. 15, 1919	Channel Chemical Co.	Track, 43rd St. and Western Ave.
48	163	Jan. 1, 1909	Chicago Surface Lines	Crossing, 47th and Leavitt Sts.
49	165	Feb. 15, 1920	F. T. Hoyt Co.	Track, 49th St. and Kedzie Ave.
50	169	April 1, 1920	Weber Storage & Distributing Co.	Rent, 27th and Robey Sts.

NOTE.—This list does not include the various agreements with industries covering settlement of demurrage charges on average basis as per national demurrage rules.

III

Leasehold and Easement Obligations

Lessor	Lessee	Date	Expiration	Annual Rental	Premises	Remarks
B. & O. R. R.	C. J. Ry...	Jan. 1, 1917	Jan. 1, 1922	$ 50.00	Rent of Foot Bridge.	90 days' cancellation. EITHER PARTY: no tax provision.
(a) B. & O. R. R.	C. J. Ry...	March 12, 1913	30 days' notice	60.00	Land 43rd & Robey Sts.	Area .144 acres. Lessee pays taxes.
Central Mfg. Distr.	C. J. Ry...	Dec. 1, 1913	Perpetual	1,875.00	Right-of-way 35th to 39th Sts., Morgan St. to Ashland Ave.	Lessor pays taxes. Area 16.385 acres.
(b) U. S. Y. & T. Co.	C. J. Ry...	Sept. 1, 1915	Year to year	1,465.73	Land in Leavitt Street Yard.	1 yr. cancellation either party. Lessee pays taxes. Area 2.792 acres.
U. S. Y. & T. Co.	C. J. Ry...	Oct. 1, 1916	Perpetual	2,800.00	Land at 40th and Wallace Sts.	Lessee pays taxes. Area 1.2 acres.
U. S. Y. & T. Co.	C. J. Ry...	April 1, 1916	Perpetual	2,500.02	Land at 39th and Racine Ave.	Area 57,161.15 sq. feet. Lessee pays taxes.
Swift & Company	C. J. Ry.	Feb. 1, 1917	Year to year	40.07	Land at 43rd and Robey Sts.	Area 6,820 square feet. Lessee pays taxes. 1 year notic either party.
Canal Commission	C. J. Ry...	Jan. 29, 1910	Jan. 29, 1930	100.00	Bridge rental over I. & M. Canal.	No cancellation or tax provisions.
Wabash R. R.	C. J. Ry...	March 1, 1916	Dec. 31, 1920	500.00	Land at 33rd and Waterville St.	Area .764 acres. 60 days cancellation by lessor. No tax provision.
Midland Whse. & Transfer Co.	C. J. Ry...	Nov. 1, 1915	Year to year	931.50	Freight platform 15th St. and Western Ave.	Area .262 acres. 60 days cancellation either party. Lessee pays taxes.
Midland Whse. & Transfer Co.	C. J. Ry...	March 1, 1917	No date	50.00	Freight Station Land 15th St. and Western Ave.	Approximately 160 sq. ft. No tax provision. At will.
Nat'l Wood Whse. & Stge. Co.	C. J. Ry...	May 1, 1916	April 30, 1921	600.00	Land at 43rd and Robey Sts.	Area 6,000 square feet. Lessee pays taxes. 6 months cancellation either party.
(c) U. S. Y. & T. Co.	C. J. Ry...	Jan. 1, 1918	Perpetual	20,750.00	Land in addition to that leased under lease of December 1, 1913.	
Central Mfg. Distr.	C. J. Ry...	Sept. 1, 1917	Aug. 31, 1937	7,294.00	Land west of Ashland Ave. to Western Ave., south of 39th St.	Area 19.029 acres. Lessee pays taxes.
(d) U. S. Y. & T. Co.	C. J. Ry...	Dec. 1, 1913	Perpetual	600,000.00	Right-of-way from Lake Michigan and 42nd St. west along 40th St. to and through the Union Stock Yards, to Western Avenue, thence north to 14th Street.	

IV

Trackage Obligations

C. R. & I. R. R.	C. J. Ry...	Jan. 1, 1909	99 years	37½c per car handled over line.	

NOTE.—Nos. (a) and (b) above have since been included in No. (c).

[fol. 234] EXHIBIT "B" TO AGREEMENT

A tabulation of all liens, encumbrances, debts, contract obligations, trackage obligations, leasehold obligations, and all other obligations relating to the railroad properties, and appurtenances of the Chicago Junction Railway Company and to the railroad properties and appurtenances of the Union Stock Yard and Transit Company, in the possession of the Chicago Junction Railway Company, under lease or otherwise—not including current operating expenses, except those herein specified.

I

Funded Debt

(a) None.

II

Equipment Obligations

(a) Equipment Trust Agreement dated January 15, 1920, between the Chicago Junction Railway Company, Director General of Railroads, and Guaranty Trust Company of New York, Trustee, covering 14 locomotives allocated to this Company. The total maximum payment due under this agreement is $442,500.00, payable in 15 equal amounts, due July 15, 1920, and semi-annually thereafter until paid. The note due July 15, 1920, has been paid. The payment of 4 of these locomotives is assumed by the Chicago River & Indiana Railroad Company, details of which are shown in "Exhibit A" of the Chicago River & Indiana Railroad Company hereto attached.

(Here follows table marked side folio page 234½.)

[fol. 235]

V

Other Obligations

(a) Track Ordinance Easement from City of Chicago to this Company dated August 5th, 1918, expiration October 5, 1934; annual rental, $420.00; track across public streets at 42nd and Lake Park Avenue; $10,000.00 bond to City.

(b) Track Ordinance Easement from City of Chicago to this Company dated February 5, 1916, expiration February 4, 1936; annual rental, $2,911.00, covering tracks in Robey Street from 43rd to 45th Street; $10,000.00 bond to City.

(c) Track Ordinance Easement from City of Chicago to this Company dated December 23, 1912, expiration December 23, 1932; an-

nual rental, $161.50; track in Benson Street; $10,000 bond to the City.

(d) Track Ordinance Easement from City of Chicago to this Company; no record of date or expiration; annual rental, $49.20; track at 15th Street and Western Avenue.

(e) Track Ordinance Easement City of Chicago to this Company dated April 14, 1911; no record of expiration; annual rental, $53.16; track across 43rd Street; track constructed in accordance with city ordinance passed February 20, 1911, page 3983 of City Council Proceedings.

(f) Track Ordinance Easement City of Chicago to Union Stock Yard & Transit Company, dated November 4, 1912; expiration November 4, 1932; annual rental, $61.00, of which this Company pays one-half. Track at Wentworth Avenue. $10,000.00 bond to the City.

(g) Agreement between the Sanitary District of Chicago and this Company, dated April 17, 1897, term of agreement indefinite; annual rental, $2,373.50. This amount represents 5% interest on bridge fund deposited by the Sanitary District of Chicago with this Company and used for maintenance purposes by this Company. This agreement amends a similar agreement dated November 14, 1895; the term of the agreement was for time necessary to build the bridge and continuance of maintenance thereof indefinitely thereafter.

(h) Agreement between the Union Stock Yard & Transit Company, Chicago Junction Railway, and Chicago Junction Railroad dated September 6, 1903, and the supplemental agreement between the same parties, for the construction of the structure for the South Side Elevated Railroad. This agreement is inserted for the purpose of disclosing whatever interest or obligation the Chicago Junction may have in the agreement.

(NOTE.—The items mentioned in the foregoing subdivisions are shown separately as a matter of convenience. Some of them are also included under subdivision VI below.)

Various Contracts, Agreements and Other Obligations Entered Into by the Union Stock Yard and Transit Company or Chicago Junction Railway Company

Item No.	File No.	Date	With whom made	Remarks
1	493	Jan. 1, 1919	Anglo-American Prov. Co., et al	Viaduct.
2	48	Jan. 9, 1902	" " " "	Easement for pipes, 39th and Racine.
3	508	Mar. 1, 1920	" " " "	Lease of passageway.
4	49	Apr. 19, 1900	" " " "	Lease of passageway.
5	493	Jan. 1, 1920	" " " "	Viaduct permit.
6	62	July 10, 1902	" " " "	Viaduct permit and wires, Iron St.
7	256	Mar. 15, 1916	" " " "	Water and sewer lines.
8	62	Sept. 23, 1902	" " " "	Water and sewer lines and cooling tower.
9	476	July 1, 1919	" " " "	Permission for meter pit.
10	62	Feb. 10, 1903	" " " "	Permission for pipes.
11	382	Aug. 2, 1915	" " " "	Permission for post for anchorage.
12	105	Sept. 12, 1906	American Can Co.	Gates at 40th St. and Canal.
13	413	Oct. 2, 1916	" " "	Sewer easement.
14	134	Apr. 18, 1907	American Car Lines	Constr. track scale, 45th and Halsted.
15	81	Mar. 10, 1905	" " "	Construction of hot water heaters, 45th and Halsted Sts.
16	104	June 30, 1906	" " "	Location of car body, 47th & Packers Sts.
17	323	Apr. 8, 1913	" " "	Lease of land for shanty.
18	368	Oct. 25, 1914	" " "	Sewer easement, 45th St. (and suppl.).
19	65	Oct. 29, 1902	Armour & Co.	Sewer easement.
20	486	Jan. 1, 1919	" " "	Pipe lines.
21	177	May 31, 1917	" " "	Use of tracks.
22	472	Aug. 1, 1919	" " "	Water main.
23	73	Oct. 27, 1903	" " "	Exchange and use of tracks.
24	514	Apr. 27, 1920	" " "	Gas pipe, Racine Ave.
25	82	Jan. 1, 1905	" " "	Construction of tracks at 32nd St.
26	467	June 10, 1919	" " "	Construction of tracks.
27	56	Sept. 2, 1902	" " "	Construction of platform, 44th St.

Various Contracts, Agreements, Etc.—*Continued*

Item No.	File No.	Date	With whom made	Remarks
28	76	Apr. 8, 1904	Armour & Co.	Gas pipe easement.
29	148	May 28, 1906	" " " , et al.	Construction of tracks.
30	201	May 1, 1908	" " " , et al.	Telephone conduit easement.
31	208	Jan. 2, 1909	" " "	Pipe line easement, 44th St.
32	266	Oct. 19, 1910	" " "	Sewer easement, 46th St.
33	157	Aug. 4, 1911	" " " , et al.	Permit for walk across tracks.
34	303	July 1, 1912	" " "	Location of track scales.
35	353	Feb. 4, 1914	" " "	Water pipe easement, 32nd St.
36	228	Feb. 4, 1910	" J. Ogden	Easement agreement.
37	380	July 1, 1915	" & Co.	Pipe line easement.
38	407	Sept. 15, 1916	" " " , et al.	Track extension.
39	425	June 1, 1917	" " "	Pipe line easement.
40	437	June 11, 1918	" " "	Water pipe easement.
41	451	Sept. 1, 1918	" " "	Construction of sewer.
42	491	Dec. 31, 1918	" " "	Lease of property, 45th and Halsted Sts.
43	457	Mar. 9, 1919	" " "	Sewer easement, 43rd Pl.
44	49	Dec. 7, 1917	" " " , et al.	Remodeling elevated span, 44th St.
45	231	Aug. 5, 1909	American District T. Co.	Conduit, Center Ave. Bridge.
46	314	Jan. 28, 1913	" " " "	A. D. T. service.
47	355	Dec. 11, 1913	" " " "	A. D. T. service.
48	355	Jan. 27, 1914	" " " "	A. D. T. service.
49	384	July 31, 1915	" " " "	Permit, Campbell Ave.
50	471	Aug. 1, 1919	" " " "	Attachment of cable.
51	295	June 1, 1912	Archer Iron Works	Right-of-way by incline.
52	353	Apr. 11, 1919	" " "	Lease, 34th St. and Campbell Ave.
53	93	June 1, 1904	" " "	Constr. platform, 34th and Campbell.
54	389	Nov. 1, 1915	Amalgamated Machinery Corporation	Right to run sewer.
55	497	Mar. 26, 1920	American Glue Co.	Construction of track.
a56	18	Apr. 21, 1895	" " "	Switching connections, Loomis St.
57	436	May 20, 1918	American Sand & Gravel Co.	Road crossing permit.
58	498	Apr. 16, 1920	American Window Cleaning Co.	Janitor service.

*59	31	Aug.	1,	1888	A., T. & S. F. Ry.	Property for tracks.
60	220	July	1,	1909	Atlas Locomotive Ash Pan	Construction and use of ash pans.
*61	15	June	23,	1893	F. E. Ashton	Side track.
62	227	Sept.	13,	1909	Aurora, Elgin & Chicago R. R.	Lease of four gondolas.
63	329	June	24,	1913	" " " "	Use of gondola cars.

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64	125	Dec.	31,	1906	Baltimore & Ohio R. R.	Union frt. station trans. agreement.
65	167	Jan.	2,	1912	" " " " "	Use of tracks.
66	363	May	1,	1914	" " " " "	Permit for pipe line, 14th st.
67	427	Jan.	1,	1917	" " " " "	Construction overhead bridge, 43rd St.
68	320	Mar.	12,	1913	" " " " "	Permit to construct track to frt. house.
69	211	Mar.	29,	1909	Berkshire Warehouse	Construction tracks, 46th St.
70	343	Dec.	15,	1915	R. W. Burns	Expense Maintenance of crossing.
71	326	May	26,	1913	Brotherhood of Locomotive Engineers	Rules and rates of pay.
72	479	Aug.	13,	1919	" " " "	Wage agreement.
73	374	Oct.	24,	1915	" " " "	Rules and rates of pay (and suppl.).
74	468	July	9,	1919	" " " "	Wage agreement.
75	377	May	11,	1915	" " " "	Wage agreement.
76	451	Dec.	1,	1917	" " " "	Wage agreement.
77	394	Nov.	1,	1915	Boilermakers & Helpers Union	Wage agreement (and supplement).
78	417	Feb.	12,	1917	Benevolent Assn. of Ry. Employees	Soliciting health and accident insurance
79	166	Apr.	29,	1903	Chicago Terminal & Transfer R. R.	Joint crossing expense with Ill. Nor.
80	24	Oct.	1,	1914	" " " " " "	Right-of-way for tracks.
*81	51	June	1,	1898	" " " " " "	Lease.
82	226	Sept.	11,	1909	" " " " " "	Flagman's services, 21st and 26th Sts.
83	94	Jan.	19,	1905	Commonwealth Electric Co.	Permit for poles.
84	247	May	31,	1910	" Edison Co.	Conduit, 35th St.
85	357	Mar.	18,	1914	" " "	Permit attaching conduits.
86	248	May	27,	1910	" " "	Guy straps.
87	359	May	1,	1914	" " "	Permit attaching conduits.
88	362	May	2,	1914	" " "	Permit to locate poles.
89	424	May	1,	1917	" " "	Conduits, 40th St.
90	109	Jan.	10,	1901	Chicago City Ry. Co.	Track at Egan Ave.
*91	35	Mar.	24,	1896	" " " "	Permit, poles, Wentworth Ave.

Various Contracts, Agreements, Etc.—*Continued*

Item No.	File No.	Date	With whom made	Remarks
o92	20	Apr. 1, 1897	Chicago City Ry. Co.	Guy poles.
93	100	Aug. 14, 1901	" " " "	Permit, poles, Emerald Ave.
94	168	Apr. 1, 1907	C. & N. W.	Bridge tenders' wages.
95	96	Dec. 3, 1904	" " " "	Lease near Campbell Ave.
96	223	June 9, 1909	" " " "	Ogden Ave viaduct.
97	229	Sept. 30, 1909	" " " "	Ground, 15th St. and Western Ave.
x98	239	Feb. 1, 1910	" " " "	Elevation of tracks, 14th and Ogden.
99	172	Mar. 24, 1906	Chicago & Western Indiana R. R.	Track connection.
100	35	Jan. 28, 1905	" " " " " "	Track agreement.
x101	2	Nov. 14, 1883	" " " " " "	Track intersection, 39th St.
102	268	Sept. 29, 1910	" " " " " "	Interlocking plant.
103	264	Sept. 29, 1910	" " " " " "	Interlocking plant.
104	409	Oct. 26, 1916	" " " " " "	Wrecking outfit agreement.
105	107	Sept. 15, 1906	" " " " " "	Track elevation and easement.
o106	22	July 14, 1885	City of Chicago	Right of crossing, Ullman St.
107	483	Oct. 25, 1919	" " "	Construction of track.
x108	9	Jan. 30, 1892	" " "	Ordinance for poles.
109	440	June 24, 1918	" " "	Tracks, reduction plant.
110	458	Aug. 5, 1918	" " "	Switch track, 46th and Lake Park Ave.
111	423	Feb. 5, 1916	" " "	Re Robey St. tracks.
112	277	Apr. 14, 1911	" " "	43rd St. tracks.
113	301	Apr. 19, 1912	" " "	Ordinance, elevation tracks, 43rd to 49th.
114	311	Nov. 4, 1912	" " "	Ordinance, Wentworth Ave. bridge.
115	316	Dec. 23, 1912	" " "	Track Benson Street.
x116	14	Apr. 1, 1893	Carl Corper Brewing Co.	Constructing siding.
x117	5	Mar. 9, 1881	Chicago and Grand Trunk R. R.	Constructing railroad, 51st St.
x118	4	Aug. 20, 1889	C. & A. R. R. et al	Crossing, Broad and Church Sts.
119	160	Apr. 14, 1905	C. & A. R. R.	Maintaining box cars for inspectors.
120	138	Nov. 1, 1906	Cole Manufacturing Co.	Permit for fence.
121	225	Aug. 28, 1909	" " "	Switch track on Bross Ave.
122	146	Aug. 7, 1906	Chicago Railway Equipment Co.	Building switch tracks.

124	171	May	29, 1906	C., B. & Q. R. R.		Telephone on 19th St.
125	219	Mar.	15, 1908	" " " " " "		Freight handling, Union Station.
126	259	July	14, 1910	" " " " " "	et al	Separation of grades, 18th and 19th Sts.
127	260	July	14, 1910	" " " " " "	et al	Separation of grades, 18th and 19th Sts.
128	286	Dec.	2, 1911	" " " " " "		Joint switch tenders, 26th and Campbell.
129	118	July	18, 1905	Chicago Great Western R. R.		Inspector's shanty at 45th St.
x130	101	May	24, 1893	" & Northern Pacific R. R.		Construction of drawbridge.
x131	116	Sept.	8, 1892	Cudahy Packing Co.		Siding.
132	312	Jan.	14, 1913	Chicago White Lead & Oil Co.		Track 15th and Western (2 contracts).

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133	88	Jan.	16, 1903	Chicago Telephone Co.		Erection of poles.
134	85	Nov.	16, 1900	" " "		Erection of poles.
135	88	May	28, 1902	" " "		Erection of poles.
136	480	May	14, 1919	Chicago Telephone Co., et al		Underground conduit, Morgan St.
137	510	Jan.	1, 1920	" " " " "		Conduit, 42nd and Loomis Sts.
138	499	Apr.	1, 1920	" " " " "		Conduit.
139	449	Aug.	30, 1918	" " " " "		Service.
140	477	May	14, 1919	" " " " "		Conduit in Laurel St.
141	511	Apr.	1, 1920	" " " " "		Conduit, 31st and Pitney Sts.
142	518	Apr.	1, 1920	" " " " "		Conduit.
143	189	Sept.	20, 1907	C. J. Rys. and U. S. Yards Co.		Delivery, I. H. B. bonds.
144	212	Mar.	24, 1909	Chicago & Erie R. R. Co.		Inspector's shed, 46th St.
145	233	Nov.	1, 1913	C. R. & I. R. R. et al		Leases.
146	215	Jan.	1, 1909	" " " " " " " "		Reciprocal trackage agreement.
147	507	May	1, 1920	" " " " " " " " "		Use of locomotives.
148	400	Nov.	16, 1914	" " " " " " " " "		Joint use of property.
149	367	Dec.	31, 1914	Thos. E. Corrigan		Shop right re switch stands.
150	465	June	1, 1919	Central Manufacturing District		Construction of tracks.
151	441	Sept.	1, 1917	" " "		Re Ashland Ave. lands.
152	489	Oct.	15, 1919	" " "		Construction of track.
153	490	Dec.	1, 1919	" " "		Construction of tracks.
154	387	Sept.	1, 1915	Chicago Title & Trust Co.		Lease, Leavitt St. Yard.
155	221	June	12, 1909	H. W. Caldwell & Son		Track to plant.
156	232	Nov.	18, 1909	Chicago Fertilizer Works		Pfaelzer premises.
157	234	Jan.	29, 1910	Canal Commissioners		Bridge, Illinois-Michigan Canal.

Various Contracts, Agreements, Etc.—*Continued*

Item No.	File No.	Date	With whom made	Remarks
158	236	Oct. 1, 1909	Cosmopolitan Electric Co.	Conduit, 35th and Iron Sts.
159	255	July 1, 1910	" " "	Permit to cross tracks, 40th and Stewart.
160	297	Aug. 15, 1912	John C. Cosgrove, et al	Perpetual easement, W. 15th St. lands.
161	470	July 25, 1919	Darling & Co.	Occupation of property, 46th and Cook.
162	179	Sept. 1, 1907	Dairy Shippers Dispatch Co.	Lease tracks, Ashland Ave.
163	494	Dec. 2, 1919	Davies Co.	Industrial track.
164	500	Jan. 15, 1920	Director General of R. R.	Equipment track agreement.
165	381	Aug. 4, 1915	Mrs. Polly Dwyer	License to sell fruit.
166	502	Apr. 30, 1920	S. J. DeVries & Co.	Lease of track.
o167	43	Aug. 3, 1880	Dennis Dorrigan, et al	Right-of-way (C. & I. S. L. Ry. Co., August 3, 1880).
168	395	Mar. 1, 1916	Delaware & Hudson Co.	Exchange of service re State of Pensylvania laws.
169	403	Apr. 1, 1916	Eagle Ice Co.	Car body space, 40th and Wallace Sts.
170	464	Jan. 1, 1919	Wm. J. Freckleton	Lease.
x171	97	Sept. 21, 1894	" " "	Wagon scale, 47th and Loomis Sts.
172	90	Aug. 29, 1901	Fairbanks Canning Co.	Gas pipe.
x173	50	Dec. 1, 1901	R. Fitzgerald	Switch patent.
174	72	July 1, 1902	" "	Machine shop rent.
175	474	July 31, 1919	Fairbanks, Morse & Co.	Indemnity agreement.
176	315	Feb. 25, 1913	Ford Motor Co.	Switch, 40th St. and Wabash Ave.
177	360	Jan. 2, 1914	John Fitzpatrick Co.	Use of track.
178	132	Jan. 8, 1907	Goodman Manufacturing Co.	Permit for chimney, 48th and Halsted.
179	175	May 5, 1907	" " "	Tracks, 48th and Halsted Sts.
180	459	July 1, 1919	" " "	Lease.
181	503	May 1, 1920	" " "	Assignment of lease, May 1, 1918, U. S. Y. & T. Co. to Goodman.
182	462	Apr. 21, 1919	" " "	Construction of track.
183	463	May 26, 1919	" " "	Construction of track.
184	466	July 16, 1919	" " "	Construction of track.
185	504	Mar. 1, 1920	" " "	Assignment U. S. Y. & T. Co. lease, March 1, 1917.
186	505	March 1, 1920	" " "	Assignment U. S. Y. & T. Co. lease, May 1, 1918.

187	124	Apr.	18, 1906	Grand Trunk & Western Ry. Co.	Exchange of property, 49th and Wallace.
188	155	June	27, 1906	E. Goldman & Co.	Elevating 40th St. track.
189	444	Nov.	18, 1919	Guggenheim Bros.	Construction of track.
190	202	Aug.	19, 1908	Great Western Smelting & Refining Co.	Wallace St. switch.
191	492	Sept.	30, 1918	W. C. Griswold	Lease.
192	61	May	29, 1902	G. H. Hammond Co.	Water pipe.
193	55	Apr.	19, 1902	" " " "	Water pipe.

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194	38	Nov.	14, 1899	Fred'k Honkamp, et al	Water pipe.
x195	46	July	1, 1897	Anna A. Honkamp	Ingress and egress.
x196	32	Oct.	26, 1891	Heisler & Junge Co.	Side track.
197	151	Sept.	30, 1904	Hoff & Brennan	Track at 40th St.
198	143	Dec.	30, 1905	Halsted Coal Co.	Track.
199	145	May	15, 1906	Harder's Fireproof Storage & Van Co.	Switch elevation and bridge.
200	254	July	1, 1910	Hermetic Closure Co.	Switch track.
201	305	Mar.	1, 1911	Hartman Furniture & Carpet Co.	Bridge and track.
202	365	Apr.	1, 1913	" " " " "	Track, 40th and Wentworth Sts.
203	379	July	28, 1915	" " " " "	Lease, platform.
204	481	May	1, 1919	Hately Bros.	Lease of tracks.
205	513	Apr.	1, 1920	" "	Water line, 37th and Iron Sts.
206	487	Jan.	1, 1920	Huber, M., Inc.	Cinder contract.
207	60	Apr.	24, 1902	Intern'l Packing Co.	Brine pipes.
x208	1	July	3, 1892	I. C. R. R.	Interlocking agreement.
x209	95	July	3, 1892	" " " "	Track elevation.
210	95	Nov.	4, 1904	Illinois Central R. R., et al.	Elevation of tracks.
211	160	July	5, 1905	I. C. R. R.	Telephone.
212	304	Oct.	26, 1912	Indiana Harbor Belt R. R., et al.	Spotting service.
213	173	June	29, 1907	Indiana Harbor Belt R. R., et al.	Trackage agreement.
214	164	Jan.	2, 1905	Indiana Harbor R. R. Co.	Track connection, 49th St.
215	152	Feb.	13, 1904	Illinois Northern R. R. Co., et al.	Crossing expenses (memo.).
216	488	Sept.	30, 1918	" " " " "	Rent of premises.
217	107	June	1, 1908	Independent Packing Co.	Subway agreement.
218	78	Nov.	28, 1903	International Harvester Co.	Conduit.
219	197	Mar.	23, 1908	" " "	Easement.

Various Contracts, Agreements, Etc. *Continued*

Item No.	File No.	Date	With whom made	Remarks
220	249	May 31, 1910	International Harvester Co.	Easement for tunnel.
221	282	May 1, 1911	Illinois Tunnel Co.	Attachment of cable.
222	330	Apr. 12, 1913	" Telephone and Telegraph Co.	Track crossing, Canal and Butler Sts.
223	340	Apr. 12, 1913	" Telephone and Telegraph Co.	Crossing and right to attach.
224	519	July 20, 1920	" District Telegraph Co.	Watch box system.
225	446	Sept. 15, 1918	Individual Towel & Cabinet Serv. Co.	Towels, etc.
226	115	Jan. 15, 1917	Int. Bro. of Blacksmiths & Helpers	Wage agreement.
227	430	Dec. 1, 1917	" " " Boilermkrs. & Ship Bldrs.	Wage agreement.
228	328	Jan. 10, 1913	R. W. King	Switching track, 40th St.
229	482	May 1, 1919	" " "	Track lease.
230	335	Sept. 30, 1913	H. V. Krug	Elevation of switch, 40th St.
231	411	June 13, 1916	E. Kennealy	Roof guarantee.
#232	92	Jan. 23, 1901	D. R. Lewis, et al.	Agreement re suit, etc.
233	47	July 17, 1902	L. S. & M. S. R. R.	Use of track.
234	115	June 1, 1898	Live Poultry Transportation Co.	Lease.
#235	112	July 13, 1892	Libby, McNeil & Libby	Agreement re tracks.
#236	230	May 11, 1907	Mary E. Leitsch	Lease (and renewals).
237	296	June 1, 1912	Link Belt Co.	Fence.
238	336	Apr. 24, 1913	Le Moyne, Wm.	40th St. track.
239	346	Jan. 2, 1914	Laly Column Co.	Fence.
240	136	Mar. 1, 1907	M. C. R. R.	Shanty, 45th St.
241	68	Sept. 27, 1900	" " " "	Water pipe.
242	84	Jan. 29, 1903	McCormick Harvester Co.	Water main.
243	398	Feb. 15, 1916	Merchants Loan & Trust Co.	Agreement with J. E. Baum, Jr.
#244	10	Nov. 1, 1893	Mutual Fuel & Gas Co.	Crossing at 41st St.
#245	8	Apr. 28, 1893	" " " " "	Water line, 41st St.
246	228	Sept. 30, 1909	Midland Warehouse & Transfer Co.	Easements (two contracts).
247	345	Dec. 1, 1913	" " " " "	Lease.
248	390	Nov. 1, 1915	" " " " "	Lease.
249	421	Mar. 11, 1917	" " " " "	Dead pile agreement.

250	278	Nov.	28, 1910	Walter Mills		15th St. property.
251	279	May	1, 1911	" "		Lease. (See No. 290.)
252	91	June	6, 1901	Metropolitan West Side Ry. Co.		Right for elevated tracks.
253	386	Oct.	1, 1915	Massachusetts Bonding & Ins. Co.		Soliciting applications.
254	186	Aug.	.., 1907	Morris & Co.		Lights.
255	443	Aug.	20, 1918	" " "		Indemnity agreement .
256	385	Sept.	1, 1915	" " "		Land at 45th St.
257	432	Dec.	19, 1917	International Assn. of Machinists		Working agreement.
7258	16	May	26, 1893	Nash, J. F.		Track agreement.

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259	163	Jan.	31, 1906	National Car Line Co.		Lease, 46th St.
260	214	Apr.	1, 1909	North American Provision Co.		Permit for crossing.
261	375	May	28, 1915	N. Y. C. R. R.		Exchange agreement.
262	404	May	1, 1916	National Wool Wholesale & Stge. Co.		Lease.
263	420	Feb.	7, 1917	" Railway Time Service Co.		Watch service.
264	512	Apr.	1, 1920	Thomas F. O'Brien		Lunch room ground.
265	439	July	1, 1918	Otis Elevator Co.		Inspection.
266	433	Nov.	1, 1917	Oxweld Acetylene & Wizard Prod. Co.		Division of track expenses.
267	58	Apr.	1, 1902	Pabst Brewing Co.		42nd St. property.
268	89	Jan.	17, 1903	" " "		Pipe line.
269	269	Jan.	16, 1911	" " "		Easement.
270	388	Nov.	1, 1915	Samuel Peterson		Lease, 35th and Aberdeen track.
271	170	Aug	19, 1905	Pennsylvania Co.		Relocating crossing.
272	157	July	3, 1905	" "		Track elevation.
273	174	Nov.	16, 1907	" "		Lighting agreement.
274	469	July	18, 1919	Pick & Co., Albert		Track construction.
275	126	Dec.	1, 1906	Provision Dealers' Dispatch		Pipe line.
276	87	Aug.	1, 1901	Postal Telegraph Cable Co.		Conduit.
277	66	Nov.	22, 1902	P. G. L. & C. Co.		Pipe lines.
278	354	Dec.	1, 1913	" " " " " "		Lease, right of way.
279	392	Dec.	1, 1915	" " " " " "		Service pipe.
280	478	Mar.	1, 1919	" " " " " "		Lease, etc.
281	429	Aug.	1, 1917	" " " " " "		Pipe line.
282	438	May	1, 1918	" " " " " "		Pipe line.

Various Contracts, Agreements, Etc.—*Continued*

Item No.	File No.	Date	With whom made	Remarks
283	167	Nov. 12, 1902	P. C. C. & St. L. R. R., et al	Crossing agreement.
284	157	Jan. 21, 1905	" " " " " " " " " "	Track connection.
285	119	June 30, 1905	" " " " " " " " " "	Lighting subway.
x286	218	June 18, 1909	P. C. C. & St. L. R. R.	Supplement to 157 and 159.
287	157½	Jan. 21, 1905	" " " " " " " " " "	Crossover, 49th St., etc.
288	159	Jan. 21, 1905	" " " " " " " " " "	Trackage agreement.
289	57	Feb. 21, 1902	Payson, Geo. L.	Release.
290	461	Apr. 12, 1919	Pullman Couch Co.	Construction of track.
291	270	Feb. 10, 1911	Pfaelzer, Louis	Guy wire posts.
292	275	Mar. 30, 1911	" "	Guy wire posts.
293	410	July 1, 1913	" "	Easement and agreement.
294	517	Mar. 11, 1920	" "	Guy wire agreement.
295	111	Apr. 26, 1902	Prackna, John Jos.	Shed right.
296	108	July 1, 1901	Rittenhouse & Embree	Sewer lease.
297	106	Oct. 26, 1906	" " "	Pipes, permit.
298	454	Dec. 1, 1918	Robertson Bros.	Lease 37th and Morgan.
299	341	Oct. 10, 1913	Rockwood Sprinkler Co.	Sprinkler agreement.
300	506	Mar. 1, 1920	Robinson Coal Co., Milton E.	Assignment by U. S. Y. & T. Co., lease, Feb. 1, 1915.
301	64	Sept. 26, 1902	Rogers, H. W., et al	Pipe permit.
302	123	Mar. 24, 1906	Spoor, Codman, et al	Easement, 39th St.
303	77	May .., 1904	Spoor & Winston	Deed, track, 38th St.
x304	3	May 23, 1887	Sexton, Patrick J.	Side track.
x305	29	Nov. 14, 1895	Sanitary District of Chicago	Bridge.
306	276	Mar. 31, 1911	" " " "	Wire crossing.
307	284	Oct. 5, 1911	" " " "	Wire transmission.
308	29	Apr. 17, 1897	" " " "	Bridges.
309	209	Mar. 5, 1909	" " " "	Intersection, Lowe Ave.
310	110	Apr. 13, 1900	Sturges, Frank	Construction of track.
311	98	Jan. 10, 1902	Schenck, S. C.	Fence.
312	113	July 31, 1906	Swift & Co.	Water pipe.

313	54	May	...	1901	" " "	... of al ... Viaduct.
314	67	July	...	1900	" " "	... Pipe.
315	86	Apr.	30,	1901	" " "	... Pipe line.
316	130	Mar.	6,	1907	" " "	... Laying pipe.
317	245	Feb.	12,	1910	" " "	... Laying pipe.
318	426	May	1,	1917	" " "	... Track scale.
319	434	Oct.	1,	1917	" " "	... Water main.
320	452	May	11,	1918	Swift & Co., et al	... Conduits, etc.

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320	452	May	11,	1918	Swift & Co., et al	... Elevated viaduct.
321	456	May	15,	1919	" " "	... Driveway.
322	447	Nov.	1,	1917	" " "	... Encroachment of warehouse.
323	460	Jan.	22,	1919	" " "	... Conduit.
324	484	Sept.	15,	1919	" " "	... Track maintenance.
325	485	Sept.	15,	1919	" " "	... Rubbish platform lease.
326	496	Jan.	1,	1920	" " "	... Robey St. tracks.
x327	26	Nov.	26,	1875	John F. Tracy, et al	... Right of way.
328	422	Nov.	1,	1916	Swift Refrigerator Transportation Co	... Strip of land.
329	521	Feb.	2,	1920	" " " " "	... Water main.
330	120	Sept.	15,	1905	Schwarzchild & Sulzberger	... Inspector's shanty.
331	63	July	16,	1902	" " "	... Pipe line.
332	364	Dec.	1,	1913	Spoor & Leonard	... Lease, C. M. D. property.
333	399	Mar.	20,	1916	" " " & Thayer	... Easement.
334	99	Nov.	9,	1900	John B. Sherman, et al	... Tucker track lights.
335	397	Mar.	20,	1916	The Streets Co	... Equipment lease.
336	419	Oct.	1,	1916	Sefton Manufacturing Corporation	... Construction of crossing.
337	356	Dec.	27,	1913	South Side Elevated R. R	... Indiana Ave. station.
338	292	Apr.	30,	1912	Standard Slaughtering Co	... Use of Wallace St.
339	222	June	17,	1909	Simmons Manufacturing Co	... Construction of track.
x340	6	Aug.	22,	1887	Streets Stable Car Line Co	... Track connection.
x341	7	Dec.	1,	1887	Streets Stable Car Line Co	... Track connection.
342	25	May	1,	1907	Universal Gas Co	... Archer Ave. right.
343	39	Nov.	30,	1903	" " "	... Track lease.
344	162	Mar.	20,	1906	United Telephone Electric Co	... Poles.
345	290	Mar.	28,	1912	U. of C	... Lease, alley, 15th St.

Various Contracts, Agreements, Etc.—*Continued*

Item No.	File No.	Date	With whom made	Remarks
346	455	Mar. 15, 1919	U. S. Y. Distr. Agcy	Office space.
347	273	May 1, 1917	" " " " "	Lease, railroad track.
348	348	Dec. 1, 1913	U. S. Y. & T. Co.	Lease, railroad track.
349	262	Oct. 1, 1916	" " " " " "	Lease.
350	412	Oct. 1, 1916	" " " " " "	Wallace St. property.
351	435	May 1, 1917	" " " " " "	Livingston siding.
c352	21	Nov. 18, 1885	Union Steel Co.	Exchange of tracks.
353	402	July 12, 1916	Viscosity Oil Co.	Pipe line.
354	140	Feb. 7, 1907	E. J. Winslow Co.	Construction of track.
355	169	Dec. 1, 1905	Wabash R. R.	Use of elevators.
356	414	Jan. 22, 1917	Western Union Telegraph Co.	Signal service.
x357	11	Mar. 5, 1892	" " " "	Coal rights.
358	473	July 1, 1919	" " " "	Conduit.
359	475	May 12, 1919	" " " "	Conduit.
360	515	Apr. 1, 1920	" " " "	Permission to attach conduits.
361	520	Apr. 26, 1920	" " " "	Permission to attach conduits.
362	183	July 17, 1907	West Chicago Park Commissioners	Marshall Blvd. subway.
363	289	Oct. 19, 1913	Wabash R. R.	Traffic agreement.
364	396	Mar. 1, 1916	" " "	33rd St. property.
365	516	Feb. 2, 1920	Wilson & Co.	Permission for sign.
366	495	Mar. 15, 1920	Wm. Wrigley, Jr. Co.	Construction of tracks.
x367	117	July 3, 1891	T. E. Wells Co.	Construction of tracks.
x368	114	Sept. 10, 1890	" " " "	Construction of tracks.
x369	37	May 21, 1891	Henry E. Weaver	Side track agreement.
370	27	Aug. 31, 1893	West and South Town Street Ry. Co.	Crossing, 22nd St.
x371	23	Dec. 10, 1895	" " " " " " "	Crossing, 23rd St.
x372	24	Nov. 19, 1895	" " " " " " "	Crossing, 26th St.
c373	13	June 25, 1880	John A. Yale, et al	Archer Ave.
x374		June 10, 1920	Trustees of Central Mfg. District and Sanitary District of Chicago	Easement for temporary ditch and bridge.
x375		Aug. 10, 1920	Sanitary District of Chicago	Easement for conduit in Stk. Yds. Slip.
x376		About July 1, 1920	City of Chicago	Easement for sewer south thru Stk. Yds.

NOTE. Items marked (c) were made by Union Stock Yard & Transit Co.
NOTE. Items marked (x) were made by Chicago & Indiana State Line Ry. Co.

[fols. 242 & 243] Union Stock Yard and Transit Company

I

Funded Debt

(a) The Union Stock Yard and Transit Company has executed a trust deed to the First Trust & Savings Bank, dated January 1, 1920, securing $500,000.00 debenture bonds maturing January 1, 1930. This trust deed states that the Union Stock Yard and Transit Company shall not place upon its property any other mortgage or lien that shall take priority over these bonds. Although this item does not affect the interests of the Chicago Junction, it is inserted here for the purpose of disclosing the issue of bonds secured by the Union Stock Yard and Transit Company property.

II

Equipment Obligations

(a) None.

III

Leasehold and Easement Obligations

(a) None. Attention, however, is called to the lease from the Union Stock Yard and Transit Company to the Chicago Junction Railway dated December 1, 1913, and supplemental lease of January 1, 1918, mentioned and disclosed as items (d) and (e) under Caption III Leasehold and Easement Obligations of Exhibit "B" of the Chicago Junction Railway.

[fol. 244] In the District Court of the United States for the Northern District of the Eastern Division of Illinois

[Title omitted]

Order Dismissing Bill of Complaint—Filed June 28, 1923

This day this cause coming on to be heard before a Court composed of a Circuit Judge, and two District Judges, pursuant to the statute in such case made and provided, upon the bill of complaint of said plaintiffs, and upon the motion to dismiss of the United States, The New York Central Railroad Company, The Chicago River and Indiana Railroad Company, The Chicago Junction Railways and Union Stock Yards Company, The Chicago Junction Railway Company and Richard Fitzgerald, and upon the answer of the Interstate Commerce Commission, and upon the motion of the plain-

tiffs for an interlocutory injunction, all parties being before the Court in person as well as by counsel, the Court having heard the arguments of counsel and being fully advised in the premises,

Doth order, adjudge, and decree that the motion of the plaintiffs for an interlocutory injunction be and the same is hereby denied;

And thereupon the plaintiffs moved the court for leave to amend their said bill of complaint instanter, which said motion was thereupon granted, and said amendment having been made instanter, thereupon on motion of the defendants, the answer of the Interstate Commerce Commission and the several motions of said other [fol. 245] defendants to dismiss the bill of complaint were ordered to stand to the bill of complaint as amended.

Thereupon said cause came on again to be heard before the Court constituted as aforesaid, upon the bill of complaint as amended and upon the motion of the plaintiffs for an interlocutory injunction, and upon said motions of said several defendants to dismiss the said bill of complaint as amended, the Court having heard the arguments of counsel and being fully advised in the premises

Doth order, adjudge and decree and it is hereby ordered, adjudged and decreed that the motion of the plaintiffs for an interlocutory injunction be and the same is hereby denied and that the several motions of said several defendants to dismiss said bill of complaint as amended be and the same are hereby granted, and

It is hereby ordered, adjudged and decreed that the said bill of complaint as amended be and the same is hereby dismissed at plaintiffs' costs.

Enter:

Francis E. Baker, Circuit Judge. Carpenter, Wilkerson, District Judges. Dated 28 June, 1923.

[fols. 246 & 247] [File endorsement omitted.]

[fol. 248] In the District Court of the United States for the Eastern Division of the Northern District of Illinois

[Title omitted]

Petition for and Order Allowing Appeal—Filed June 10, 1923

To the Honorable George A. Carpenter, District Judge:

The above named, The Baltimore & Ohio Railroad Company; Chicago, Indianapolis & Louisville Railway Company; Chicago & Erie Railroad Company; Grand Trunk Western Railway Company; The Pennsylvania Railroad Company; and The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 28th day of June, A. D. 1923, do hereby appeal from said decree to the Supreme Court of the United States, for the reasons set forth in

the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States, under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order [fols. 249 & 250] relating to the required security to be required of them, be made.

Luther M. Walter, John S. Burchmore, Nuel D. Belknap,
Solicitors for Plaintiffs.

Appeal allowed upon giving bond as required by law for the sum of $500.00.

—— ——, Judge.

[File endorsement omitted.]

[fol. 251] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 10, 1923

Now come the plaintiffs in the above-entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause, from the decree made by this honorable court on the 27th day of June, 1923.

I. That the District Court of the United States, for the Eastern Division of the Northern District of Illinois, erred in denying the motion of the plaintiffs for an interlocutory injunction.

II. That the said Court erred in granting the motion of the United States of America to dismiss plaintiffs' bill of complaint, as amended; the motion of The New York Central Railroad Company and The Chicago River and Indiana Railroad Company to dismiss plaintiffs' bill of complaint, as amended; in granting the motion of The Chicago Junction Railway Company to dismiss plaintiffs' bill of complaint, as amended; and in granting the motion of The Chicago Junction Railways Company and Union Stock Yards Company and Richard Fitzgerald, to dismiss plaintiffs' bill of complaint, as amended.

III. That the said Court erred in dismissing plaintiffs' bill of [fol. 252] complaint, as amended, at the plaintiffs' cost.

Wherefore, the appellant prays that said decree be reversed and that the said District Court for the Eastern Division of the Northern

District of Illinois, be ordered to enter a decree reversing the decision of the said court in said cause.

Luther M. Walter, John S. Burchmore, Nuel D. Belknap, Solicitors for Appellant.

[File endorsement omitted.]

[fols. 253-255] Bond on Appeal for $500.00, approved and filed July 14, 1923, omitted in printing.

[fols. 256 & 257] In the District Court of the United States for the Eastern Division of the Northern District of Illinois

[Title omitted]

Motion to Dismiss Wabash Railway Company as Party Plaintiff—Filed July 16, 1923

Now comes the Wabash Railway Company, one of the plaintiffs in the above-entitled cause, by its attorney, Luther M. Walter, and moves that it be dismissed as a party plaintiff in said cause.

Luther M. Walter, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 258] In the United States District Court, Northern District of Illinois, Eastern Division

[Title omitted]

Order Dismissing Wabash Ry. Co. as Party Plaintiff—Entered July 16, 1923

Upon motion of the Wabash Railway Company, one of the plaintiffs herein, by its attorney, that it be dismissed as a party plaintiff in said cause, It Is Hereby Ordered that said Wabash Railway Company be and it is hereby dismissed as a party plaintiff in the above entitled cause. Nunc pro tunc as of June 28, 1923.

[fol. 259] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

PRÆCIPE FOR A RECORD—Filed July 16, 1923

To John H. R. Jamar, Clerk of the above-named Court:

In preparing the transcript of record to be transmitted to the Supreme Court of the United States, in accordance with the order granted on July 10, 1923, allowing an appeal in the above entitled case, please insert copies of

Bill of complaint of the plaintiffs.
Original processes and marshal's return.
Motion to dismiss of the United States of America.
Motion to dismiss of The New York Central Railroad Company and The Chicago River and Indiana Railroad Company, defendants.
General and special motion to dismiss of the Chicago Junction Railway Company, defendant.
General and special motion to dismiss of the Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald, defendants.
Motion of Wabash Railway Company to be dismissed as party plaintiff.
Petition of intervention of the Interstate Commerce Commission and appearance of Interstate Commerce Commission.
Answer of the Interstate Commerce Commission.
Verified motion of plaintiffs to amend bill of complaint.
Exhibits 3 and 4 to Bill of Complaint.
Order of the Court dated June 28, 1923.
Petition for Appeal.
[fol. 260] Assignments of error.
Order allowing the appeal.
Bond.
Citation.

Luther M. Walter, John S. Burchmore, Nuel D. Belknap, Solicitors for Appellant.

Received a copy of the above præcipe the 10th day of July, 1923.
Edwin A. Olson, Solicitor of Record for the United States of America. Glennon, Cary, Walker & Murray, Robert J. Cary, E. T. Glennon, Bertrand Walker, S. C. Murray, Solicitors of Record for the New York Central Railroad Company and the Chicago River and Indiana Railroad Company, Appellees. Silas H. Strawn and Ralph M. Shaw, Solicitors of Record for the Chicago Junction Railway Company, the Chicago Junction Railways and Union Stock Yards Company, and Richard Fitzgerald, Appellees. P. J. Farrell, Solicitor of Record for the Interstate Commerce Commission, Appellee. July 13, 1923.

[File endorsement omitted.]

[fol. 261] NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

CLERK'S CERTIFICATE

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Præcipe filed in this Court in the cause entitled the Baltimore & Ohio Railroad Company et al. vs. United States of America, The New York Central Railroad Company, et al., In Equity, No. 3427, as the same appear from the original records and files thereof now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 6th day of August, A. D. 192-.

John H. R. Jamar, Clerk. [Seal of the Dist. Court U. S., Northern Dist., Illinois.]

[fol. 262] [Title omitted]

CITATION ON APPEAL—Filed July 16, 1923, omitted in printing

[fol. 263] Accepted service of the above citation for the United States of America, Appellee, on the 10th day of July, 1923.

Edwin A. Olson, Solicitor of Record for the said Appellee.

Accepted service of the above citation for The New York Central Railroad Company and The Chicago River and Indiana Railroad Company, appellees, on the 10th day of July, 1923.

Glennon, Cary, Walker, Murray. Robert J. Cary, E. T. Glennon, Betrand Walker, S. C. Murray, Solicitors of Record for said Appellees.

Accepted service of the above citation for The Chicago Junction Railway Company; The Chicago Junction Railways and Union Stock Yards Company; and Richard Fitzgerald, appellees, on the 10th day of July, 1923.

Silas H. Strawn, Ralph M. Shaw, Solicitors of record for said Appellees.

Accepted service of the above citation for the Interstate Commerce Commission, appellee, on the 13th day of July, 1923.

P. J. Farrell, Solicitor of Record for said Appellee.

[fol. 264] [File endorsement omitted.]

Endorsed on cover: File No. 29,799. E. Illinois D. C. U. S. Term No. 489. The Baltimore & Ohio Railroad Company, Chicago, Indianapolis & Louisville Railway Company, Chicago & Erie Railroad Company, et al., appellants, vs. The United States of America, Interstate Commerce Commission, The New York Central Railroad Company, et al. Filed August 7th, 1923. File No. 29,799.

FILED
JAN 7 1924
WM. R. STANSBURY
CLERK

No. 489.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

BALTIMORE & OHIO RAILROAD COMPANY, et al.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
Counsel for Appellants.

BARNARD & MILLER PRINT, CHICAGO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

No. 489.

BALTIMORE & OHIO RAILROAD COMPANY, et al.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, et al.,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

This case comes here on appeal from the decree of the District Court for the Northern District of Illinois, without opinion, dismissing the bill of complaint of the Baltimore & Ohio Railroad Company, Chicago, Indianapolis & Louisville Railway Company; Chicago & Erie Railroad Company; Grand Trunk Western Railway Company; the Pennsylvania Railroad Company; and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, brought to enjoin an order of the Interstate Commerce Commission dated May 16, 1922, in Finance Docket 1165 and to set aside all acts performed by the corporate defendants, New York Central Railroad Company, The Chicago River & Indiana Railroad Company;

the Chicago Junction Railway Company; the Chicago Junction Railways and Union Stock Yards Company; and the individual defendant, Richard Fitzgerald, under said order, and to restore the *status quo* of May 15, 1922.

The order of the Commission, the invalidity of which is alleged by the bill of complaint was entered by the Commission upon the application of the New York Central Railroad Company (hereinafter called the Central) filed December 28, 1920, copy of the said application being attached to the bill of complaint and marked Exhibit 3, seeking authority and a certificate of public convenience and necessity (a) permitting the applicant to purchase the capital stock of the Chicago River & Indiana Railroad Company, hereinafter referred to as the River Road, for $750,000; (b) permitting the River Road to lease the properties, owned and leased, of the Chicago Junction Railway Company, hereinafter referred to as the Junction, for 99 years, renewable at the option of the lessee in perpetuity at an annual rental of $2,000,000; and (c) authorizing an option to the applicant or its nominee at any time during the term of said lease to purchase all of the capital stock or properties of the Junction for the sum of $33,333,333.

The application filed by the Central asked for a certificate of convenience and necessity under paragraphs 18 to 20 of Section 1 and for authority under paragraph 2 of Section 5 of the Interstate Commerce Act. No application was filed by any parties other than the Central. The application was docketed by the Commission as Finance Docket 1165.

Plaintiffs at the first hearing, April 5, 1921, filed their intervening petition (Paragraph VII of Bill of Complaint, Rec., 6), in opposition to the application, and were made parties to said proceeding.

After full hearing the Commission made its report (71 I. C. C. 631) and entered its order * of May 16, 1922, authorizing the Central to acquire control of the River Road by purchasing its capital stock at a price not exceeding $750,000 and the River Road to acquire control of all of the properties of the Junction under a lease for a term of 99 years, renewable at the option of the lessee in perpetuity at an annual rental of $2,000,000. On May 29, 1922, plaintiffs filed a petition for modification of the report and order and for a reversal of the Commission's finding and order on the grounds set forth in Exhibit 2. (Rec., 34.) Said petition was denied by the Commission June 12, 1922.

The application of the Central stated that the same was filed pursuant to the provisions of Paragraphs 18 to 20, inclusive, of Section 1, and paragraph 2 of Section 5 of the Interstate Commerce Act. Said paragraphs 18 to 20, inclusive, provide as follows:

> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this act

* "IT IS ORDERED, That the acquisition by the New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock at a price not exceeding the sum of $750,000 be, and the same is hereby, approved and authorized.

IT IS FURTHUR ORDERED, That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized." (Rec., 33.)

shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each state in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.

From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in inter-

> est; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Paragraph 2 of Section 5 of the Interstate Commerce Act provides as follows:

> "(2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

The Commission issued no certificate of convenience and necessity such as was prayed for under Section 1 of the Interstate Commerce Act, but with four commissioners dissenting, issued a report (Rec., 15) which purports to be a finding that the acquisition by the Central of the control of the River Road by the purchase of stock and the acquisition by the River Road of control of the Junction under a lease, will be in the public interest, subject to the observance of 17 conditions. The order, entered by the Commission, of which the report was made a part, approved and authorized the said acquisition.

The bill of complaint was filed in the District Court for the Northern District of Illinois, alleging the invalidity of the order of the Commission as being in excess of the authority conferred by law upon the Commission, and as being wholly without evidence in support thereof.

The relief sought by the bill of complaint was an injunction (a) setting aside the order of the Commission, and (b) requiring the defendants to set aside and vacate all acts taken in accordance with the authority granted by the Commission's order and to restore the *status quo* of May 15, 1922.

All the defendants filed motions to dismiss. (Rec., 40, 41, 44 and 47.)

The case came on for hearing before Baker, Circuit Judge, and Carpenter and Wilkerson, District Judges, upon the motions to dismiss and upon the application for a temporary injunction. The court entered a decree denying the motion for preliminary injunction and dismissing the bill of complaint. (Rec., 143.) To reverse that decree the case comes here on appeal.

Under Section X of the bill of complaint, paragraphs 4 to 7, inclusive, it is alleged that the order of the Commission is unlawful and void because the record upon which the order was based contains no evidence either that present or future public convenience and necessity requires, or will require, the acquisition of the Junction Roads by the Central, and no evidence that acquisition by the Central of control of the River Road by purchase of stock and acquisition by the River Road of control of the Junction by lease will be in the public interest. On the contrary, it is alleged that the record before the Commission contains evidence which clearly shows that acquisition of the River Road and the Junction by the Central as authorized by the Commission is, and will be, con-

trary to present or future public convenience and necessity and contrary to public interest and to a sound public policy. On motion to dismiss these allegations stand admitted. On the present state of the record, the validity of these grounds upon which it is urged that the order is unlawful and void, cannot be determined by this court. An examination of the evidence before the Commission is necessary to a determination of these particular grounds of invalidity. If the decree of the District Court is reversed and further proceedings are necessary, it will be clearly shown from the record before the Commission that not only was there no evidence upon which the Commission could find that acquisition of control authorized by the Commission's order would further public convenience and necessity, or be in the public interest; but on the contrary, it will be clearly shown from the evidence before the Commission that the acquisition authorized was contrary to public interest and to a sound public policy, and that instead of serving public convenience and necessity the necessities and convenience of the public have been seriously injured. While little is said in this brief on the question of public interest, it should be clearly understood that the plaintiffs in no wise abandon their contention that there was no evidence upon which the Commission could base its report and order.

ASSIGNMENTS OF ERROR.

The assignments of error are as follows:

1. The court erred in denying the motion of the plaintiffs for an interlocutory injunction.

2. The court erred in granting the motions to dismiss the bill of complaint, as amended.

3. The court erred in dismissing plaintiffs' bill of complaint, as amended, at the plaintiffs' cost.

The questions of law which we think are properly presented under the foregoing assignments are:

1. Plaintiffs may properly bring this suit.

2. Plaintiffs are properly joined as parties.

3. The order complained of is affirmative and is properly within the jurisdiction of this court.

4. The bill is not multifarious.

5. Plaintiffs have not been guilty of laches in filing the bill.

6. Courts will enjoin an order of the commission if the same is unlawful in any respect.

7. The order of the Commission is not a certificate of public convenience and necessity.

8. Acquisition of control (a) by the Central of the River Road by purchase of stock; and (b) by the River Road of the Junction by lease, involves a consolidation of the Central, River Road and the Junction Road into a single system for ownership and operation; authorization of such acquisition of control is beyond the power of the Commission.

9. The order of the Commission is void if it authorizes the consolidation of the properties of the River Road and the Junction Road into a single corporation in violation of Paragraph (6) of Section 5, because the Commission had not (has not yet) perfected its general plan of consolidation.

10. The order is void insofar as it permits the River Road to lease the properties of the Junction, because neither the River Road nor the Junction Road made any application to the Commission for the authorization contained in the order.

11. The order of the Commission is not a specific finding that the acquisition by the Central of the River Road and Junction Road will be in the public interest.

12. The order of the Commission is void because it does not specify the date upon which the same shall become effective.

13. The order is void insofar as it approves and authorizes the leasing of the Junction properties, owned and leased, to the River Road, because no lease executed by the parties had (has yet) been submitted to and been approved by the Commission.

BRIEF OF ARGUMENT.

I.

Plaintiffs may properly bring this suit.

(a) THE VENUE IS PROPERLY LAID.

District Court Jurisdiction Act, 38 Stat. L. 219.

Commerce Court Act, Sec. 1, 36 Stat. L. 539.

(b) PLAINTIFFS ARE PROPER PARTIES AND HAVE SUCH AN INTEREST IN THE ORDER OF THE COMMISSION AS TO ENTITLE THEM TO MAINTAIN THIS SUIT.

Commerce Court Act. 36 Stat. L. 539.

Elkins Act, Sec. 2, 32 Stat. L. 847.

Detroit & M. R. Co. v. *Boyne City G. & A. R. Co.*, 286 Fed. 540.

F. H. Peavey & Co. et al. v. *Union Pacific Co.*, 176 Fed. 409; affirmed 222 U. S. 42, 49; 56 L. Ed. 83-88.

Edward Hines, Yellow Pine Trustees et al. v. *United States et al.*, No. 91, decided Nov. 12, 1923.

The Atlantic Coast Line R. Co. et al. v. *Interstate Commerce Commission*, 194 Fed. 449.

McLean Lumber Co. v. *United States*, 237 Fed. 460.

Duplex Printing Press Co. v. *Deering*, 254 U. S. 443; 65 L. Ed. 349.

American Steel Foundries v. *Tri-City Central Trades Council et al.*, 257 U. S. 184, 66 L. Ed. 189.

International Railway Co. v. *Davidson*, 257 U. S. 506, 66 L. Ed. 341.

Raritan & Delaware Bay Railroad Co. et al. v. *Delaware & Raritan Canal et al.*, 18 N. J. Eq. 546.

Memphis Street Railway Co. v. *Rapid Transit Co.* (Tenn.), 179 S. W. 635, P. U. R. 1916-A, 834.

Brooklyn City R. R. Co. v. *Whalen*, 191 App. Div. 737, 182 N. Y. Supp. 283.

People ex rel. The New York Central & H. R. Co. v. *Public Service Com.*, 195 N. Y. 157.

People ex rel. New York Edison Co. v. *Willcox*, 207 N. Y. 86.

Conway v. *Taylor*, 66 U. S. 603, 17 L. Ed. 191.

Town of East Hartford v. *Hartford Bridge Co.*, 10 How. 511, 13 L. Ed. 518.

Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394.

Bartlesville Electric Light & Power Co. v. *Bartlesville Interurban Ry. Co.*, 29 L. R. A. 77.

Consolidation of Railroads, 63 I. C. C. 455.

II.

Plaintiffs are properly joined as parties.

Elkins Act, 32 Stat. L. 847.

Equity Rule No. 37.

Philadelphia & Reading Ry. Co. v. *Laurel Coal Mining Co.*, 276 Fed. 1019.

Goldfield Consolidated Mining Co. v. *Richards*, 194 Fed. 198.

Risley et al. v. *City of Utica et al.*, 173 Fed. 502.

III.

The order complained of is affirmative and is properly within the jurisdiction of this court.

Commerce Court Act, 36 Stat. L. 539.

Procter & Gamble Co. v. *United States et al.*, 225 U. S. 282, 56 L. Ed. 1091.

Intermountain Rate Case, 234 U. S. 476, 58 L. Ed. 1408.

Tap Line Cases, 209 Fed. 244; affirmed in 234 U. S. 1, 58 L. Ed. 1185.

Skinner & Eddy Corp. v. *U. S.*, 249 U. S. 557, 63 L. Ed. 772.

McLean Lumber Co. v. *United States*, 237 Fed. 460.

IV.

The bill is not multifarious.

Shields v. *Thomas*, 18 How. 253, 15 L. Ed. 368.

United States v. *Union Pacific*, 160 U. S. 1, 40 L. Ed. 319.

Chicago, Milwaukee & St. Paul Ry. Co. v. *U. S.*, 244 U. S. 351, 61 L. Ed. 1184.

Edmund F. Gaines et ux. v. *Chew*, 2 How. 619, 11 L. Ed. 402.

Tap Line Cases, 209 Fed. 244.

United States v. *Union Pacific*, 226 U. S. 61, 57 L. Ed. 124.

V.

Plaintiffs have not been guilty of laches in filing the bill.

Halstead v. *Grinnan*, 152 U. S. 412, 38 L. Ed. 495.

United States v. *Southern Pacific Co.*, 259 U. S. 214, 66 L. Ed. 907.

VI.

Courts will enjoin an order of the Commission if the same is unlawful in any respect.

Interstate Commerce Commission v. *Union Pacific*, 222 U. S. 541, 56 L. Ed. 309.

Interstate Commerce Commission v. *Northern Pacific R. Co.*, 216 U. S. 538, 54 L. Ed. 608.

VII.

The order of the Commission is not a certificate of convenience and necessity.

Interstate Commerce Act, par. 18 of Sec. 1, par. 2 of Sec. 5, 41 Stat. L. 476, 480.

Finance Docket 2919, *Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company* (not yet reported).

VIII.

Acquisition of control (a) by the Central of the River Road by purchase of stock; and (b) by the River Road of the Junction by lease, involves a consolidation of the Central, River Road and the Junction into a single system for ownership and operation; authorization of such acquisition of control is beyond the power of the Commission.

(a) THE APPLICATION FILED WITH THE COMMISSION SHOWS THE PURPOSE TO MAKE THE JUNCTION AND RIVER ROAD A PART OF THE SYSTEM KNOWN AS THE NEW YORK CENTRAL LINES.

(b) THE JUNCTION AND RIVER ROAD HAVE BEEN OPERATED ALONG WITH OTHER CARRIERS CONSTITUTING THE NEW YORK CENTRAL LINES, UNDER A COMMON CONTROL AND MANAGEMENT AS A SINGLE SYSTEM.

(c) THE PHRASE "NOT INVOLVING THE CONSOLIDATION OF SUCH CARRIERS INTO A SINGLE SYSTEM FOR OWNERSHIP AND OPERATION" APPLIES ALIKE TO CONTROL (1) UNDER A LEASE; (2) BY THE PURCHASE OF STOCK; (3) IN ANY OTHER MANNER.

Interstate Commerce Act, par. 2 of Sec. 5, 41 Stat. L. 480.

Securities Application of Pittsburgh & West Virginia Railway, 76 I. C. C. 663.

Coxson v. *Doland*, 2 Daly 66.

State ex rel. Crow v. *St. Louis*, 174 Missouri 125, 61 L. R. A. 593, 73 S. W. 623.

(d) CONSOLIDATION IS ANY FORM OF UNION OR COMBINATION WHEREBY A SINGLE CONTROL IS EXERCISED OVER PROPERTIES EACH OF WHICH WAS THERETOFORE SUBJECT TO DIFFERENT CONTROL.

United States v. *St. Paul, Minneapolis & Manitoba Railway Co. et al.*, 247 U. S. 310, 62 L. Ed. 1130.

In the Matter of the Application of Pittsburgh & West Virginia Railway Company, 70 I. C. C. 682.

Consolidation of Railroads, 63 I. C. C. 455.

Merger of Subsidiary Companies with Boston & Maine, 76 I. C. C. 797.

In the Matter of the Application of the Western Pacific Railway Company for Authority to Acquire Control of the Sacramento Northern Railroad and to Purchase Its Bonds, 71 I. C. C. 653.

Control of Central Pacific by Southern Pacific, 76 I. C. C. 508.

E. St. Louis Connecting Railway Co. et al. v. *Jarvis*, 92 Fed. 735.

United States v. *Southern Pacific Co. et al.*, 239 Fed. 998.

Same case, reversed, 259 U. S. 214, 66 L. Ed. 907.

Northern Securities Case, 193 U. S. 197, 48 L. Ed. 679.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Minneapolis Civic and Commerce Assn.*, 247 U. S. 490, 62 L. Ed. 1229.

Louisville & Nashville R. R. Co. v. *Kentucky*, 161 U. S. 677, 40 L. Ed. 849.

IX.

The order of the Commission is void if it authorizes the consolidation of the Properties of the River Road and the Junction Road into a single corporation in violation of Paragraph (6) of Section 5, because the Commission had not (has not yet) perfected its general plan of consolidation.

Interstate Commerce Act, par. 6 of Sec. 5, 41 Stat. L. 480.

X.

The order is void insofar as it permits the River Road to lease the properties of the Junction, because neither the River Road nor the Junction Road made any application to the Commission for the authorization contained in the order.

Interstate Commerce Act, par. 2 of Sec. 5, 41 Stat. L. 480.

Hanlon v. Eshelman, 169 Calif. 200, 146 Pac. 656, P. U. R. 1915-B, 842.

XI.

The order of the Commission is not a specific finding that the acquisition by the Central of the River Road and Junction Road will be in the public interest.

XII.

The order of the Commission is void because it does not specify the date upon which the same shall become effective.

Interstate Commerce Act, par. 2 of Sec. 15, 34 Stat. L. 584.

XIII.

The order is void insofar as it approves and authorizes the leasing of the Junction properties, owned and leased, to the River Road, because no lease executed by the parties has been submitted to and been approved by the Commission.

Control of Central Pacific by Southern Pacific, 76 I. C. C. 508.

ARGUMENT.

1. Plaintiffs May Properly Bring This Suit.

In this part of the brief we shall discuss the provisions of the statute and court decisions bearing upon the right of these plaintiffs to bring this particular suit. No attack is made upon the venue laid in this case. It is, however, asserted strenuously that these particular plaintiffs cannot maintain this particular suit under the circumstances shown of record. The authority of the Commission was exercised so as to approve and authorize acquisition of control by the Central of the River Road and the River Road of the Junction by lease. If these plaintiffs cannot invoke a judicial determination of the legality of the Commission's order, who can? The New York Central Lines could not be expected to question the validity of a decision in their favor. The Department of Justice could not be expected to bring a suit to establish the validity of the Commission's order. Unless these plaintiffs may invoke the jurisdiction of the courts, then the action of the Commission is beyond any review in the courts.

(a) *The venue is properly laid.*

District Court Jurisdiction Act, approved October 22, 1913, 38 Stat. L. 219, abolished the Commerce Court, vested its jurisdiction in the District Court of the United States, and further provided:

> "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose peti-

tion the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party, the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office."

The order complained of was made upon the petition of the New York Central Railroad Company, defendant, and that corporation is a resident of the Northern District of Illinois. If the order complained of does not relate to transportation, or is not made upon the petition of any party, the matter complained of, viz.: control of the Junction and River Road, is in the Northern District of Illinois. If the order does not relate either to transportation or to a matter complained of before the Commission, then the matter covered by the order arises in the Northern District of Illinois, where the Chicago, Indianapolis & Louisville Railway Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, petitioners in court, have their principal operating offices.

Section 1 of the Commerce Court Act (36 Stat. L. 539) created the Commerce Court and gave it the jurisdiction vested by Circuit Courts over all cases of the following kinds:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

Section 4 of the Commerce Court Act provided that all cases in the Commerce Court which would but for that Act have been brought against the Interstate Commerce Commission, should be brought against the United States.

The District Court Act provided that

> "The procedure in the District Courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court."

(b) *Plaintiffs are proper parties, and have such an interest in the order of the Commission as to entitle them to maintain this suit.*

Section 5 of the Commerce Court Act provided that the attorney general should have charge and control of the interests of the government in all cases in the Commerce Court and in the Supreme Court upon appeal from the Commerce Court. This section contained a proviso:

> "That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the terms of this Act, or the acts of which it is amendatory or which are amenda-

tory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General of the United States therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

All of the plaintiffs in this case were parties to the proceeding before the Commission out of which the order and decision of the Commission arose, and under the Commerce Court Act they may appear as parties to the proceeding in the Commerce Court and, we may add, now in the District Court.

Moreover, in Section 2 of the Elkins Act, 32 Stat. L. 847, it is provided:

"That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

Plaintiffs as parties interested in or affected by the order made by the Commission, have a right to bring

this suit. Paragraph 20 of Section 1 of the act provides that any operation contrary to the provisions of Paragraph 18 or 19 of Section 1 may be enjoined by any court of competent jurisdiction at the suit of the United States, the Interstate Commerce Commission or any commission or regulating body of the state or states affected, or any party in interest.

In *Detroit & M. R. Co.* v. *Boyne City G. & A. R. Co.*, 286 Fed. 540, the District Court for the Eastern District of Michigan considered the right of the Detroit & Mackinaw Railway Company to an injunction restraining the Boyne City, Gaylord & Alpena R. R. Co. from constructing or operating certain tracks of railroad without first obtaining from the Interstate Commerce Commission a certificate of public necessity and convenience. It was contended that the plaintiff was not "a party in interest" within the meaning of paragraph 20 of Section 1 of the Interstate Commerce Act, which provides "any construction, operation, or abandonment contrary to the provisions of this paragraph, or of paragraph 18 or 19 of this section, may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest." The court held that the railroad company now operating, and whose business would be affected by the construction of a competing line, was a party in interest and as such entitled to the relief prayed for, and enjoined the construction of the proposed extension unless and until there should first have been obtained from the Interstate Commerce Commission a certificate of public convenience and necessity.

In various cases similar to this the courts have uniformly sustained the right of parties similarly situated to invoke jurisdiction of the court to test the validity of these orders.

In the case of *F. H. Peavey & Co. et al.* v. *Union Pacific Co.*, 176 Fed. 409, 417, the court said:

> "A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the Commission to those who were parties to the proceeding before it upon which the order was based. The proceeding in the court is not an appeal; it is a plenary suit in equity. 'The jurisdiction to hear and determine suits' is vested in the Circuit Courts. Section 16, as amended (34 Stat. 592 (U. S. Comp. St. Supp. 1909, p. 1162)). The determination of the question what parties may mainatin such suits is left by the interstate commerce act to the general rules and practice in equity, and under them any party whose rights of property are in danger of irreparable injury from an unauthorized order of the commission may appeal to a federal court of equity for relief."

And further at pages 417-418:

> "The complainants in the Diffenbaugh case are entitled to challenge the order of the commission in this court. The allegations in their bill that this order was beyond the power of the commission and will irreparably injure their property and their business present good ground for equitable relief, and the demurrer of the commission must be overruled. For the same reasons, the petitions of the railroad companies that seek to intervene present substantial equities and their motion for leave to file them and to become parties to this suit must be granted."

Upon appeal to this court the decision of the lower court was affirmed, Justice Holmes saying, 222 U. S. 42, 49, 56 L. Ed. 83-88:

> "The jurisdiction in the Diffenbaugh case was doubted, although the Commission did not press the point, as it wishes a final decision. We are content to leave that matter on the statement of the court below. 176 Fed. 416, 417. The plaintiffs are affected by the order, and it is just that they should have a chance to be heard, although not parties before the Commission."

In this case it cannot be doubted that plaintiffs are affected by the order. That they were affected was made plain in the petition of intervention filed by the Commission and is recognized by the Commission in its report and opinion wherein it is stated (Rec., 19):

> "The intervening carriers contend, in effect, and offer proofs tending to show, that the plan is contrary to public interest because the Junction and River Road lines are now neutral and open to all carriers and shippers on equal terms; that the plan would substitute monopoly of these facilities for the present neutrality of operation, to preserve which the Transportation Act, 1920, was designed, as evidenced by paragraph (4), Section 3 of the Interstate Commerce Act, as amended; that the livestock market requires open operation of the facilities serving the stock yards, and the shippers in the district must have competitive service by neutral terminals; that the car supply for the district cannot and will not be handled fairly by the Junction if controlled by the Central; that the latter will be able by means of such control to divert a large volume of competitive line-haul traffic to its own rails, thereby causing the intervening carriers to lose earnings to such an extent as to necessitate advanced rates, and that such carriers have an equity in the properties by reason of having contributed to the Junction's earnings. They offer to combine with the Central in a joint control of the properties on the basis of their fair value."

On this state of the record it ought not be difficult to reach the conclusion that these plaintiffs are parties who have such an interest in the order of the Commission as to entitle them to maintain this suit.

In *Edward Hines, Yellow Pine Trustees, et al.* v. *United States et al.*, No. 91, decided November 12, 1923, this court held that the mere fact that plaintiffs were not parties to the proceedings in which the order of the Commission was entered, does not constitute a bar to a suit, but plaintiffs could not maintain the suit merely by show-

ing that the Commission was without power to make the order complained of. As the court said, plaintiffs "must show also that the order alleged to be void subjects them to legal injury, actual or threatened." So in this case, inasmuch as plaintiffs were parties to the proceedings in which the order was entered, they may maintain the suit, but they must also show that the order complained of subjects them to legal injury, actual or threatened.

That plaintiffs are subjected by the order complained of to legal injury appears from the allegations in amended paragraph XII of the bill of complaint which reads as follows (Rec., 53):

> "Plaintiffs further show that the River Road and the Junction, on May 15, 1922, were, and prior to that date always had been, neutral belt railroads uncontrolled by any trunk line carrier and as such were used by all railroads entering Chicago, impartially and without discrimination; that prior to May 16, 1922, the plaintiffs herein competed for traffic originating at points of origin on, or destined to points of delivery on, the said River Road and the Junction on equal terms with the Central without either the plaintiffs or the Central having any advantage in the securing of said traffic by reason of having an ownership or control of the said River Road and/or the said Junction; that the acquisition of control approved and authorized by the Commission in its order of May 16, 1922, substitutes monopoly of control and operation for the neutral control and operation of the Junction and River Roads which prior to May 16, 1922, served alike all railroads reaching Chicago, including the plaintiffs herein and the Central; that practically all of the tonnage originating at or destined to points on the Junction and the River Roads is competitive tonnage in that the same could be hauled either over the lines of railroad constituent parts of the New York Central System or over the lines of one or more of your plaintiffs; that the control of a belt line by one line-haul carrier gives that line-haul carrier substantial advantages in the securing of competitive tonnage to the consequent disad-

vantage of competing line-haul carriers not having such control; that in cases where the shippers on the River Road and the Junction have failed to direct the route of movement of their shipments consigned to points which are served by the Central or by lines of railroad constituent parts of the New York Central System, directly or through its or their connections, as well as by the plaintiffs herein, directly or by their connections, it is and since May 16, 1922, has been the practice of the officials, agents and employees of the River Road and the Junction to route said shipments via the line of the Central and via the lines of carriers constituent parts of the New York Central System to the exclusion of routing any of said shipments via the lines of the plaintiffs herein; that the acquisition of control approved and authorized by the Commission in its said order has curtailed, and so long as it continues to exist, will, greatly curtail the ability of the plaintiffs to secure the competitive traffic of shippers located upon the lines of the Junction and the River Road for the reason that subsequent to May 16, 1922, it has been, now is, and will be, the practice of shippers located on the said railroads to give preference to cars of the Central (which, under the order complained of, has the control of the said Roads) to the exclusion of cars of the plaintiffs, its competitors, and to route their shipments via the line of the Central and via the lines of railroad constituent parts of the New York Central System in lieu of routing said shipments via the lines of the plaintiffs herein; that the diversion of tonnage from the rails of the plaintiffs to the rails of the Central or other routes of the New York Central System, consequent upon the facts above related has resulted in a large loss of traffic and of revenue to the plaintiffs, to their irreparable loss and injury, in an amount exceeding $10,000,000; and that the loss in net earnings to plaintiffs which will result from the continued control acquired under the said order of the Commission will approximate $10,000,000 per annum so long as said control continues."

The foregoing allegations, which are admitted upon motion to dismiss, show that *by reason of the control*

which the New York Central acquired under the order of the Commission, tonnage which prior to the order moved via the lines of the plaintiffs, and but for the order would continue to move via the lines of the plaintiffs, now moves via the lines of the New York Central System, with resulting loss of revenue to these plaintiffs.

In the report of the Commission it is recited that the Junction and River Road handle traffic of the stock yards and Central Manufacturing District in the City of Chicago. While the report does not set forth the volume of traffic handled to and from the stock yards and packing house industries, it is a matter of general public information that the volume of this traffic is tremendous. The Commission does refer to the Central Manufacturing District as an institution which has been in existence for about fifteen years, having 180 industries, producing a tonnage of over 100,000 carloads per year and 100,000 tons per year of less-carload freight. (Rec., 17.)

On this state of facts it is obvious that claims of the plaintiffs are most substantial. But for the order complained of the New York Central Lines would have no control whatever over the routing of shipments, furnishing of cars, and the many other activities of the terminal carrier, which vitally affect the selection of the line-haul carriers for the handling of freight consigned to and from industries located on the Junction and River Roads.

This is not a case where plaintiffs are subjected to loss "incident to more effective competition." This is a case where open unrestricted competition has been converted into a complete monopoly. The ideal terminal situation, both as regards ownership and operation, existed prior to the action of the Commission in permitting the New York Central System to acquire the Junction and River Roads. What was feared and was urged upon the Com-

mission as a reason for denying the application for control, has actually resulted. Not mere fear of possible damage do plaintiffs show; actual loss to the plaintiffs has resulted from the unlawful order of the Commission.

The Commission recognized that these plaintiffs would lose business to the New York Central if the acquisition was authorized, saying in its opinion (Rec., 22):

> "There is, of course, every indication that the Central will be able to build up its own line-haul traffic as the result of its connection with the management of the Junction, and it by no means follows that harm to the public may result from legitimate effort and initiative to that end."

The contention we are here making is supported by many decisions, a few of which are here set forth:

In a suit to set aside an order of the Interstate Commerce Commission, *The Atlantic Coast Line R. Co. et al. v. Interstate Commerce Commission*, 194 Fed. 449, by demurrer and motion to dismiss, the question of the right of two railroad companies and two steamship companies not named in the order of the Commission but joined as parties with others in the bill, was raised. The bill alleged that the parties plaintiff in the bill who were not parties to the proceeding before the Commission, and against whom no order was issued, would have to make a voluntary reduction in their rates to the rates named in the order running against competing carriers. The Commerce Court held that these parties had sufficient interest in the subject matter of the suit to become parties plaintiff to set aside the order of the Commission. This case went no farther.

In *McLean Lumber Company* v. *United States*, 237 Fed. 460, the plaintiffs brought a bill in equity to enjoin an order of the Commission which canceled certain rates under suspension and permitted modified rates to

go into effect. The Interstate Commerce Commission moved to dismiss the petition on the ground that the order under attack did not directly affect the petitioners' own property or its use, and because petitioners had no vested interest in any rates filed by a carrier with the Commission. The court, Warrington, Circuit Judge, and Sanford and McCall, District Judges, held, however (page 464):

> "The petitioners have such interest in the rates ordered by the Commission to be put into effect as to entitle them to maintain this proceeding. They are manufacturers of lumber, having mills at Chattanooga, constructed and equipped at large expense, to whose operation, as they allege, logs purchased along the line of the railroad company in Alabama and Mississippi is the chief and indispensable source of supply; and, as they allege, the increased rates on these logs fixed by the orders of the Commission have caused the plant of one of the petitioners to be wholly abandoned, that of another to be shut down, and those of the two others to be greatly limited in their operations. Under the allegations of the petition they are directly affected in the conduct of their business by the orders of the Commission; and, if the rates fixed by these orders are unreasonably high, have suffered and will suffer great pecuniary damage.
>
> We cannot sustain the contention made by the Commission, in which the United States does not join, that merely because the orders made by the Commission do not directly affect the petitioners' own property or its use, and because they have no vested interest in any rates filed by a carrier with the Commission, they have no such pecuniary interest or property right involved under the orders in question as to give them a standing in court for the purpose of obtaining injunctive relief."

The court reviews *Merchants Association* v. *U. S.*, 231 Fed. 292, and *Railroad Company* v. *Ellerman*, 105 U. S. 166, and *In re Debs*, 158 U. S. 564, and further says (page 465):

"we find nothing in these decisions constraining us to conclude that the interest of a shipper in the rate which he is required to pay for the transportation of his property in the necessary conduct of his business is not such a direct pecuniary interest and property right as to give him the necessary standing in a court of equity for its protection."

The court then reviews other cases, comments upon the Commerce Court Act and the District Court Act, and continues (page 467):

"Construing the foregoing provisions of the Commerce Court Act in their entirety, we are of opinion that it was intended that any person who had acquired a standing as a party in interest in proceedings before the Commission should have the right to appear as a party in any suit brought in the court involving the validity of an order therein made by the Commission, as distinguished from the mere right of intervention given to other persons who were not parties in interest before the Commission, but merely 'interested in the controversy or question,' and that the right thus given to a party in interest before the Commission is not limited to his appearance as an intervener in such proceedings as may be instituted by other parties in interest before the Commission, but includes the right to appear in the court as a party plaintiff in proceedings which he himself may bring to test the validity of the order of the Commission. And we hence conclude that, under the statutory provisions above quoted, the petitioners herein, having duly appeared before the Commissioners as complainants against the rates proposed to be established under the new schedule filed by the railroad company, not only became parties in interest before the Commission in the proceedings had upon such complaint, but that as such parties in interest in such proceedings they are now entitled, as of right, to appear as parties plaintiff under their petition in this court in proceedings to set aside the order of the Commission."

In *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; 65 L. Ed. 349, this court held that the Clayton Act

gives to private parties a right to relief by injunction in any court of the United States against threatened loss or damage from a violation of the anti-trust laws "under the conditions and principles regulating the granting of such relief by courts of equity." This court there pointed out the nature of the threatened loss to the plant, as follows (page 465):

> "That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce is necessary for the successful conduct of the business; that a wide-spread combination exists, to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated; and that, as a result of it, complainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future,—is proved by clear and undisputed evidence. Hence, the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act, as amended by the Clayton Act."

Paraphrasing what was said there, we think the right of plaintiff's railroads to secure and transport traffic from shippers located on the Chicago Junction Railway, in commerce, is a property right entitled to protection against unlawful injury or interference.

As a result of the unlawful order complained of in this case, the New York Central Lines are put in position to seize what theretofore had been business of these plaintiffs, and to divert the same to routes of the New York Central Lines, where the line haul revenue would be received and retained by the New York Central Lines. Not solely because they are in better position to compete with these plaintiffs do the New York Central

Lines receive this diverted traffic, but because they are in a position to seize the property and direct its routing. It is not alone by reason of increased competition that these plaintiffs are injured, but in addition because of the actual control and possession of the Junction Railways with consequent power to route traffic, that these plaintiffs are injured.

In *American Steel Foundries* v. *Tri-City Central Trades Council, et al.*, 257 U. S. 184; 66 L. Ed. 189, this court held that the irreparable injury to a property right, which under Section 20 of the Clayton Act of October 15, 1914, affords ground for injunctive relief in cases "between an employer and employees, or between employers and employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment" includes injury to the business of the employer, following *Duplex Printing Press Co.* v. *Deering, supra.*

In *International Railway Co.* v. *Davidson*, 257 U. S. 506, 66 L. ed. 341, this court sustained the right of the International Railway Company to maintain a suit against the Collector at the port of Buffalo, holding that the owner of the International toll bridge, by its passenger trolley cars and by foot and vehicular traffic, had a sufficient interest to justify a resort to relief by injunction against the threatened enforcement of a ruling of the Treasury Department under which the continuance of customs inspection service on Sundays and holidays at the American end of the bridge is conditioned upon the payment by the bridge owner of the extra cost of the inspection service on those days and the giving of an indemnity bond to the United States covering any resultant losses to the government. There the plaintiff insisted that the power asserted by the Collector would

result in depriving the plaintiff of business which it would receive but for the unlawful act of the Collector. This court found that "the instructions given threaten vital interests of the Bridge Company, to which a court of equity should afford protection."

In *Raritan & Delaware Bay Railroad Co. et al.* v. *Delaware & Raritan Canal, et al.*, 18 N. J. Eq. 546, an injunction was issued to prohibit a rival railroad from engaging in the transportation of passengers or merchandise between the cities of New York and Philidelphia without the consent of the plaintiff, in accordance with the provisions of an act of the legislature of the State of Delaware. It was contended that the plaintiff had no right to bring such a suit, the question being, as stated by the court "has a railroad company any redress against a competition, unwarranted by law, and which materially affects the value of the privilege with which it is legally vested?" We quote from that decision (570-1):

> "I am at a loss to perceive upon what premises, or by what course of reasoning, other than an affirmative answer to this question could be justified. A franchise to build a railroad for public use and to take tolls, is property, the title to which is held from the sovereign; and, like every other thing susceptible of private ownership, it must, of necessity, be under the protection of the laws. Unless it can be shown that this species of right is altogether anomalous in its character, and is under the control of exceptional rules, a wrongful invasion of such right cannot but be followed by a legal vindication. Theoretically, then, the claim to judicial redress is clear, and all legal analogies, as well as decided cases, concur in support of the same view."

In *Memphis Street Railway Co.* v. *Rapid Transit Co.* (Tenn.), 179 S. W. 635; P. U. R., 1916-A, 834, the Supreme Court of the State of Tennessee discussed in a very comprehensive way, and cited numerous authorities in support of, the proposition that a common car-

rier, although it owns a non-exclusive franchise, has a property right entitling it to enjoin the competitive operations of other carriers, when such operations are without necessary legislative or municipal authority. There the court said:

> "The complainant does not seek an injunction here on the theory that it is possessed of an exclusive franchise to conduct the business of common carrier of passengers on the streets of Memphis. The contention of complainant is that, having been granted a franchise as such common carrier, it has a property right that will entitle it to restrain any person or corporation from attempting to engage in the business of common carrier of passengers on the streets of Memphis, in competition with complainant, without legislative or municipal authority. Complainant concedes that its franchise is not exclusive, in the sense that a similar franchise might not be granted to another to be exercised and enjoyed in the City of Memphis; but it maintains that its franchise is exclusive against all persons upon whom similar rights have not been conferred by legislative sanction.
>
> We think this contention is well founded and supported by the great body of authority."

In *Brooklyn City R. R. Co.* v. *Whalen*, 191 App. Div. 737; 182 N. Y. Supp. 283, the court, on the application of a competing street railway company, enjoined the operation of a bus line operating without a franchise, saying, page 287 of 182 N. Y.:

> "The plaintiff plainly suffers a special injury from the competition of these stage lines and from the added obstruction to the operation of its cars under its franchise. Even if the order establishing the lease is not to injure the plaintiff in the exercise of its legal rights, it has that effect. * * * A common carrier, therefore, has a legal right to question the necessity and convenience to the people of a paralleling common carrier. * * * The plaintiff having a franchise to operate in the public streets and being under financial pressure of the prevailing

economic conditions, suddenly finds its most profitable lines paralleled by stages operating under the control of the defendant without the authority of law and without having obtained a certificate of public convenience and necessity. I think the plaintiff has a standing in a court of equity for relief."

In *People of the State of New York ex rel. The New York Central & Hudson River Railroad Co.* v. *Public Service Commission*, 195 N. Y. 157, the court had under consideration a determination of the Board of Railroad Commissioners in granting a Certificate of Public Convenience and Necessity under Section 59 of the Railroad Law to the Buffalo, Niagara Falls & Rochester Railway Co. The court said in part (p. 166):

"It is also insisted by the appellant that the relator was not a party aggrieved by the action of the board of railroad commissioners. That was a question for the board and the Appellate Division to consider. It turned upon the facts relating to the relator's situation, as affected by the proposed railroad construction. The relator showed that it would be affected, inasmuch as it owned other roads more or less paralleling the proposed road and serving the same territory. It appeared at the hearings and was allowed to take part in the proceedings by the tribunal, as having an interest in the controversy. The certificate of public convenience and necessity is to be granted upon considerations, not alone, bearing upon the convenience of the public, but affecting the other transportation companies, which are already serving the territory. They have the right to be considered and to be protected, where there is no necessity for a wider public service, against the designs of persons more interested in forcing terms from them, than in subserving the public convenience. Certainly the rights of shareholders in the existing roads demand fair consideration."

This decision was followed in a later case, *People ex rel. New York Edison Co.* v. *Willcox*, 207 N. Y., page 86, where the court said in part (page 95):

"The appellant was and for many years had been furnishing electricity for light, heat and power in the boroughs of Manhattan and The Bronx. It was directly and seriously interested in this proceeding which thus involved the consideration and determination of the present right of the respondent to place wires for those uses in those boroughs or acquire property or construct a plant to be used in competition with it. The commission might legally and justly permit it to become a party to the proceeding and the determination adverse to it after its intervention was reviewable, under certiorari, upon its application as the party aggrieved thereby."

In *Conway* v. *Taylor,* 66 U. S. 603, 17 L. Ed. 191, the court enjoined invasions of the complainant's ferry rights on the ground that the ferry franchise was a property right and that any interference therewith was enjoinable.

In *Town of East Hartford* v. *Hartford Bridge Co.,* 10 How. 511; 13 L. Ed. 518, this court sustained an injunction against the operation of a ferry at the suit of a bridge company. The Town of East Hartford operated a ferry on the Connecticut River under a franchise conferred by the legislature. Upon the erection of a bridge by the Bridge Company the legislature resolved that the ferry should be discontinued. Thereafter, however, the town re-established the ferry and the Bridge Company thereupon sought to enjoin its operation. After reviewing the facts, this court, speaking through Mr. Justice Woodbury said, (page 530):

"It follows, then, finally, that East Hartford, in proceeding to exercise the ferry privilege again since 1842, and to the special injury of the Bridge Company, has done it without legal authority, and should therefore be restrained by an injunction from exercising it longer."

In the *Slaughter House Cases,* 16 Wall. 36; 21 L. Ed. 394, this court sustained the right of the Slaughter

House Company to enjoin operation by its competitors under a statute conferring an exclusive privilege in the Slaughter House Company to carry on a live stock landing and slaughter house business at New Orleans.

In the case of *Bartlesville Electric Light & Power Co.* v. *Bartlesville Interurban Railway Company*, 29 L. R. A. 77, the Supreme Court of Oklahoma held that the Bartlesville Electric Light & Power Company had a right to sue to restrain the Bartlesville Interurban Railway Company from using streets, lanes and alleys of the City of Bartlesville for the purpose of erecting thereon a system of poles and wires for the purpose of supplying the city and its inhabitants with electric light and power, because their erection without legislative authority from the municipal corporation was such an infringement of plaintiff's rights to exercise a franchise theretofore granted, as constituted an infringement of property rights.

To that decision is appended a note which collects the authorities supporting the right of the owner of a franchise for public benefit, not exclusive, to injunction against the invasion of such franchises without right by another party.

We are not unmindful of the fact that there is a class of cases, such as *Baxter Telephone Co.* v. *Cherokee County Mutual Telephone Ass'n.*, 94 Kans. 159, 146 Pac. 324, in which the Supreme Court of Kansas held that a telephone company has not that peculiar interest in the establishment of a second telephone company in a competitive field as distinguished from the general public, so as to authorize it to maintain an injunction suit against its rival, when that rival does not hold a license from the Public Utilities Commission under Laws 1911, Chap. 238, Sec. 31. The weight of authority, however, and the better reasoning, is against the rule enunciated in the *Baxter Telephone case*.

The question of the right of these plaintiffs to bring this suit under the circumstances of record presents for decision a matter of public importance. It is hardly probable that Congress intended that no court review could be had of any order of the Commision under paragraph (2) of Section 5 of the Interstate Commerce Act. It is abhorrent to the principles of the Interstate Commerce Act that arbitrary power may be exercised by the Commission without any power in the courts to restrain. The beneficiary of an order from the Commission under this section could hardly be expected to ask court review; who else but an injured party such as a competitor would be likely to complain? Where there is an injury there must be a remedy; where there is a right there must be a means to enforce that right.

In passing upon this question the court should effectuate the great purposes of the Interstate Commerce Act; equality of treatment between shippers and between carriers, removal of unjust discriminations and prevention of undue preferences or prejudices were intended by the Congress. No obstacles to any party appealing to the judicial power for relief from an unlawful order of the Commision should be recognized by this court, unless the statute clearly requires it.

One of the prime purposes of amendments to the Interstate Commerce Act made by the Transportation Act, 1920, was to provide for national systems of transportation by protecting and supporting the weaker lines of railroad necessary to the public as a whole. Section 5 deals with the consolidation of railroads, merging the weaker with the stronger and thus providing a vigorous system in its entirety. The effect of the order under consideration is to make an already strong line stronger still,—an already rich line richer still,—by weakening competing lines, some of which at least are not as strong

or as rich as the New York Central System. If the Commission unlawfully, forgetful of the purposes of Congress, does put a strong line in position to weaken a competitor by taking tonnage necessary for the support of the weaker line, diverting revenue therefrom to its own treasury, is it possible that the lines thus injured, cannot appeal to the courts for relief from the injury thus inflicted?

As confirming what we have here said, we call attention to the Commission's opinion promulgating the tentative plan of consolidation, *Consolidation of Railroads*, 63 I. C. C. 455, 481:

> "This tentative plan for consolidation proceeds upon the assumption that the distinction between so-called weak and strong roads, financially, is at present highly uncertain; and that it will require a period of experience under the new rates and under the new division of through rates as well as under the slowly readjusted commercial and industrial conditions after the war, in order to establish the relative earning power and credit of each. A period of trial is often necessary, both to reveal elements of strength and of weakness. Substantial equilibrium seems unlikely to be attained for a considerable period of time. Yet in the meanwhile, tentative plans must be set up, in preparation for the application of the final test of relative financial strength as soon as the available data make this possible."

2. Plaintiffs Are Properly Joined As Parties.

All of the plaintiffs were parties to the case before the Commission and as such are proper plaintiffs herein. Each of the plaintiffs is a competitor of the New York Central and complains of the effect upon its line-haul revenue which, it is asserted, follows the ownership of the Junction Roads and the control thereof by the Central.

Each of the plaintiffs has the same cause of action; each asserts the invalidity of the order of the Commission upon which the Central bases its authority for the control it exercises; each plaintiff asserts the same source of injury and each asks the same relief.

The equity rules clearly provide for the joinder of parties plaintiff. Rule 37 provides:

> "All parties having an interest in the subject of the action and in obtaining the relief demanded, may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff."

In *Philadelphia & Reading Railway Company* v. *Laurel Coal Mining Company*, 276 Fed. 1019, page 1020, the court stated the rule as follows:

> "Upon a demurrer for misjoinder of plaintiffs, the question to be determined is whether either or both plaintiffs have a remedial interest in the cause of action asserted."

In *Goldfield Consolidated Mining Co.* v. *Richards*, 194 Fed. 198, several owners of mines in severalty were permitted to join as parties plaintiff in a bill seeking to restrain several defendants (not acting in concert) from further purchase of stolen ore. At page 204 the court said:

> "The convenience of court and litigants demands that this controversy shall be determined in one suit, if one decree can be made which can do entire justice to all parties without jeopardizing any substantial rights."

In the case of *Risley et al.* v. *City of Utica et al.*, 173 Fed. 502, the plaintiffs were all property owners at Utica, New York, and filed a bill to enjoin the cancellation of an illegal tax. On demurrer, alleging misjoinder of parties, the court said (page 506):

> "The situation and rights of the complainants are sufficiently similar; their interests may not be joint, but they are common."

That Congress intended in cases of this sort that all parties interested in or affected by the order complained of might join in a single suit, is clearly indicated by Section 2 of the Elkins Act, *supra*, wherein it is provided that in any proceeding for the enforcement of the provisions of statutes relating to interstate commerce it should be lawful to include as parties in addition to the carrier, all parties interested in or affected by the rate, regulation or practice under consideration.

3. The Order Complained of is Affirmative and is Properly Within the Jurisdiction of this Court.

The motion of the United States to dismiss contends that the order is negative insofar as it relates to the plaintiffs and a mere permissive order insofar as it relates to the defendants, other than the United States, against which order a suit to enjoin will not lie under the Commerce Court Act and the Urgent Deficiencies Act of October 22, 1913.

At this point it is important to note the exact form of the order of the Commission in this case. The order provides (Rec., 33, 34):

> "*It is ordered*, That the acquisition by the New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock at a price not exceeding the sum of $750,000 be, and the same is hereby, approved and authorized.
>
> *It is further ordered*, That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized."

It is clear that the Commission exerted authority in an affirmative manner, that is to say, it approved the acquisition of control by the New York Central of the Chicago River & Indiana by purchase of capital stock and acquisition of control by the Chicago River & Indiana of the property of the Chicago Junction, by lease. The New York Central had made an application to the Commission for a certificate of convenience and necessity and for authority; the former the Commission denied; the latter the Commission granted. If the Commission had dismissed the application, it would have entered a negative order. We think it apparent from the decision of this court in the *Procter & Gamble case,* 225 U. S. 282, 56 L. Ed. 1091, urged by the United States in support of its motion to dismiss in this case, that there is no analogy or identity of situation in this case and in the *Proctor & Gamble* case.

Moreover, the motion to dismiss entirely overlooks the reasoning of this court in the *Proctor & Gamble case.* In that case the Interstate Commerce Commission had issued an order dismissing a complaint of the Proctor & Gamble Company directed at a carriers' tariff assessing demurrage on private cars. Procter & Gamble, complainant before the Commission, filed a petition in the Commerce Court praying that the order of the Commission dismissing its complaint be set aside and annulled and that the defendant carriers be enjoined from collecting demurrage charges upon its private tank cars. The carriers challenged the jurisdiction of the court on the ground that the order of the Commission was negative. This contention was overruled by the Commerce Court and the bill was dismissed upon its merits. (183 Fed. 221.) Upon appeal to this court, it was held that the order was not properly within the jurisdiction of the courts, as the statute conferred

jurisdiction only to entertain complaints "as to affirmative orders of the Commission."

Mr. Chief Justice White in delivering the opinion of the court, pointed out that the only question to be decided in that case was whether, when a complainant had been denied relief by the Commission, he had a right to invoke the jurisdiction of the courts upon the merits of such dismissal.

In considering the decision in the *Procter & Gamble case* it must be borne constantly in mind, as stated by the learned Chief Justice, that the error committed by the court below was "in holding that it had jurisdiction over the claim of the Procter & Gamble Company to recover on a money demand, based on the illegality of the demurrage charges alleged to have been wrongfully exacted by the railroad companies."

Whatever may have been the language of the opinion in that case, it must constantly be borne in mind that the court was dealing solely with an order of the Commission dismissing a formal complaint, the effect of which had been simply a denial of relief sought by the complainant,—a plain case of "negative order."

In the *Intermountain Rate Case*, 234 U. S. 476, 58 Law Ed. 1408, this court refused to hold that the District Court had no jurisdiction of an order made by the Commission almost identical in form and effect with that in the present case. By the Fourth Section of the Interstate Commerce Act, 36 Stat. L. 547, it is made unlawful for any common carrier to charge more for a shorter than for a longer distance, over the same line or route, in the same direction, the shorter being included within the longer distance, provided, however, "that upon application to the Interstate Commerce Commission such common carrier may in special cases

after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property." After a hearing the Commision had entered Fourth Section Order 124, denying certain applications for fourth section relief, and further providing:

> "that petitioners herein be, and they are hereby, authorized to establish and maintain, effective November 15, 1911, commodity rates from all points in zones numbered 2, 3 and 4, as above defined, to points intermediate to Pacific Coast Terminals that are higher to intermediate points than to Pacific Coast terminals; * * * The Commission does not hereby approve any rates that may be established under this authority, all such rates being subject to complaint, investigation and correction if they conflict with any other provisions of the act."

The Commission contended that the court had no jurisdiction in the proceeding, because the order of the Commission was negative in character. The court refused to hold that it had not jurisdiction, saying (page 490-1):

> "The second contention as to jurisdiction yet further affords an illustration of the same mental attitude, since it rests upon the assumption that the order of the Commission refusing to grant the request of the carrier made under the 4th section was purely negative, and hence was not subject to judicial inquiry. The contention therefore presupposes that the power which, from the beginning, has been the subject of judicial review, by the mere fact of its transfer to the Commission was made arbitrary. Besides, the proposition disregards the fact that the right to petition the Commission conferred by the statute is positive, and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative, since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist. It is, of course, true, as pointed out in *Interstate Commerce Commision* v.

Illinois C. R. Co., 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155, and since repeatedly applied; that findings of fact made by the Commission within the scope of its administrative duties must be accepted in case of judicial review, but that doctrine, as was also pointed out, does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended, or have been exercised in such an arbitrary way as to amount to the exertion of authority not given,—doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse, but, on the contrary, carries with it as a necessary incident the command that the limits of a sound discretion be not transcended; which, by necessary implication, carries with it the existence of judicial power to correct wrongs done by such excess."

In the present case the Commission is given jurisdiction upon application to make an order permitting one carrier to acquire control of another under certain circumstances, just as in the fourth section provision the Commission is authorized under certain circumstances to permit a carrier to charge more for the shorter than for the longer haul, the shorter distance being included within the longer distance. We see no basis upon which a contention that the order in the present case is negative can be sustained, any more than it could be sustained in the fourth section order.

In the *Tap Line Cases*, 209 Fed. 244, 251, the Commerce Court said:

> "It is urged upon us that the petitions herein should be dismissed on the ground either that, though affirmative in form, they are nevertheless negative in substance, or that the petitioners in this court are not those against whom the order is directed. This motion must be denied. The amended order is clearly an affirmative order. It expressly forbids certain action because of its illegality."

Upon appeal to this court; 234 U. S. 1, 58 L. Ed. 1185, the decision of the Commerce Court was affirmed. On the question of jurisdiction of the Commerce Court, this court reached the same conclusion as did the Commerce Court, that the order was affirmative in its nature and of a character permitting of review under the Commerce Court Act.

In the following two cases the courts have taken jurisdiction of suits brought to enjoin orders of the Commission, and these decisions are authorities in support of the proposition we are here making:

Skinner & Eddy Corp. v. *U. S.*, 249 U. S. 557, 63 L. Ed. 772. There the Commission authorized an increase in west-bound transcontinental freight rates. (*Re Reopened Fourth Section Applications*, 40 I. C. C. 35.) The shippers brought the bill to enjoin and the Supreme Court held that the District Court had jurisdiction of the subject-matter of the suit.

McLean Lumber Co. v. *U. S.*, 237 Fed. 460. There the order sought to be enjoined was one entered in an Investigation & Suspension proceeding permitting the carrier to increase its log rates. Such an order is, of course, permissive but the District Court entertained jurisdiction of the suit.

From these decisions it is clear that the District Courts of the United States now have jurisdiction to set aside an illegal order. The mere form of the order is not controlling. Under paragraph 2 of Section 5 of the Interstate Commerce Act, no carrier can acquire control of another carrier without a finding by the Commission that the acquisition will be in the public interest. The finding of the Commission must be in accordance with the statute. Unless these plaintiffs have the right to invoke review by the

courts of the order under consideration, then no matte how arbitrary or unlawful any order of the Commissio issued under this paragraph may be, there would be n means by which to determine the legality of the Com mission's order. The act of the Commission, neither i letter or in spirit, falls within the Procter & Gam ble decision. The action of the Commission wa affirmative in character; it permitted and authorize the acquisition of the River Road and the Junctio Road, and is such an order as is covered by the second subdivision of Section 1 of the Commerce Court Act and therefore this court has jurisdiction.

The action taken under the order is no different from that which would have been taken had the Commission "ordered and directed" the Central to acquire control etc. The net result of the order is that the River Road and the Junction Road are now New York Central properties, owned, managed and operated as part of the New York Central System. Measured by its results, the order is affirmative in character and subject to the jurisdiction of the court.

4. The Bill is Not Multifarious.

It is objected that the bill is multifarious in that it seeks to enjoin an order of the Commission and at the same time to require the corporate defendants and Richard Fitzgerald to vacate, annul and rescind all action taken by said defendants in alleged conformity with the order of the Commission.

It is well recognized that in equity pleadings there must be no multifariousness; the difficulty is to determine when that rule is violated. Mr. Justice Daniel, in *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368, cites with approval the rule laid down by Mr. Justice Story (page 260):

"Justice Story, in his compilation upon equity pleading, defines multifariousness in a bill to mean 'the improperly joining in one bill distinct and independent matters, and thereby confounding them.' * * * Justice Story closes his review of the authorities upon this defect in a bill with the following remark: 'The conclusion to which a close survey of all the authorities will conduct us, seems to be, that there is not any positive, inflexible rule, as to what, in the sense of a court of equity, constitutes multifariousness, which is fatal to a suit on demurrer.'"

Applying the foregoing definition of Justice Story, there is no improper joining in this bill of distinct and independent matters. Only by reason of the Commission's order, and solely upon the authority therein conveyed, did the Central acquire the River Road and the River Road lease the Junction Road. These are not distinct and independent matters, and complaint is directed at the illegality of the order and the necessary illegality of the acts of the corporate defendants in acting under an unlawful order. As illustrating this rule we call attention to the following cases:

In *United States* v. *Union Pacific*, 160 U. S. 1, 40 L. Ed. 319, the United States brought suit against the Union Pacific Railroad Company and the Western Union Telegraph Company. An act of Congress provided that railroads subsidized by the United States should maintain and operate telegraph lines and exercise alone all the power conferred upon them. The Union Pacific had been subsidized by the United States. The United States sought an injunction against the Union Pacific and the Western Union Telegraph Company on the ground that the Union Pacific conducted its business under contracts and agreements with the Western Union which were repugnant to the statute. Relief prayed for was, first, annulment of the contract, and, second, an order com-

pelling the Union Pacific to maintain and operate telegraph lines on its roadways as required by statute. The Telegraph Company urged that if the Railroad Company refused to comply with the statute, the remedy of the United States was in an action at law by mandamus and that equity was without jurisdiction to enforce compliance with the statutory conditions. This court said, on that point (page 50):

> "The United States is certainly entitled to the interposition of equity for the cancellation of the agreements under which the telegraph company asserts rights inconsistent with the Act of 1862 and the acts amendatory thereof, as well as with the Act of 1888. Jurisdiction in equity being acquired for that purpose, the court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute between the United States, the railway company, and the telegraph company, which relate to the general subject of telegraphic communication between the points named by Congress."

So in this case, it is clear that there is jurisdiction in this court to hear a complaint directed at the lawfulness of the order of the Commission. Jurisdiction being acquired for that purpose, the court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute growing out of and depending solely upon the lawfulness of the order; if it finds the order was unlawful, it may require the parties defendant to assume the status of May 15, 1922, and to vacate all acts taken in alleged conformity with the order.

In *Chicago, Milwaukee & St. Paul Railway Company* v. *U. S.*, 244 U. S. 351; 61 L. ed. 1184, the United States sought to enjoin the defendant railway company from constructing or operating its road through a national forest, unless it executed and filed with the Secretary of the Interior a stipulation required by that officer, and

also sought to obtain damages for timber cut and destroyed and injury done in the course of the construction and operation of the railroad. It was urged by the defendant that the bill was multifarious because there was coupled with a demand for equitable relief, a demand for personal judgment on purely legal claims. On this contention, Justice VanDevanter stated that the objection was so plainly without merit "that a discussion would serve no purpose."

In *Edmund F. Gaines, et ux.* v. *Chew*, 2 How. 619, 642; 11 L. ed. 402, 411, this court said :

> "It is well remarked by Lord Cottenham, in *Campbell* v. *Mackay*, (7 Simon 564), and in 1 Mylne & Craig 603, 'to lay down any rule, applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible.' Every case must be governed by its own circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts."

Even though the bill be multifarious in that it seeks a remedy against the corporate and individual defendants, that is no ground for dismissing the bill. As was well said by the Commerce Court in the *Tap Line Case*, 209 Fed. 244, 251:

> "The petitioners in cases Nos. 90 and 91 seek not only to have the order of the Commission annulled, but pray also that the trunk lines may be ordered to perform certain contracts made with them. As this court is without jurisdiction to enforce such contracts, this additional prayer may be disregarded. Neither joining a cause of action over which this

> court has no jurisdiction with one over which the court has jurisdiction nor the joining of unnecessary parties defendant would, however, justify the dismissal of the petitions."

We would also call the court's attention to *United States* v. *Union Pacific*, 226 U. S. 61; 57 L. Ed. 124. In that case the United States sued to enforce the provisions of the Sherman Anti-Trust Act against certain alleged conspiracies and combinations in restraint of interstate commerce, growing out of the purchase by the Union Pacific Railroad Company of the dominant stock interest in the Southern Pacific. This court, in outlining the relief that should be granted, said (page 96):

> "In applying this general rule of relief we must deal with each case as we find it; and in the present one the object to be attained is to restrain the operation of and effectually terminate the combination created by the transfer of the stock to the Union Pacific Company. In that view the decree to be entered in the District Court shall provide an injunction against the right to vote this stock while in the ownership or control of the Union Pacific Company, or any corporation owned by it, or while held by any corporation or person for the Union Pacific Company, and forbid any transfer or disposition thereof in such wise as to continue its control, and shall provide an injunction against the payment of dividends upon such stock while thus held, except to a receiver to be appointed by the District Court to collect and hold such dividends until disposed of by the decree of the court."

It is a well-known rule of equity that the court having secured jurisdiction of the subject matter will proceed to do complete justice between the parties with respect to all things pertaining to that subject matter. This is for the purpose of avoiding a multiplicity of suits.

Justice would not be done merely by dismissing from this proceeding all the defendants other than the United States and simply enjoining, setting aside and anulling

the order of the Commission. In order for full justice to be done in the premises, the court must take such action as will set aside the unlawful acts of the defendants taken in accordance with the order of the Commission. The New York Central must divest itself of that control which it has taken under the permission granted by the Commission. The situation of the parties of May 15, 1922, should be restored. Without such action being taken, the full measure of relief to which plaintiffs are entitled cannot be had.

It will, therefore, be observed that if the court merely sets aside the order of the Commission and takes no action with respect to the things done thereunder by the other defendants, that numerous other suits must and will follow with respect to this same subject matter. Under these circumstances, the court, having properly secured jurisdiction of the bill praying that the order of the Commission may be set aside, should proceed to deal in this one proceeding with the entire subject matter, and should restore the *status quo* in order that the parties and the courts may not be put to the time and expense of litigating this same matter in other suits, entering such decrees as will wipe out the unlawful order and nullify all action taken thereunder.

5. Plaintiffs Have Not Been Guilty of Laches in Filing the Bill.

It will be observed that there is no provision in the statute which requires that a bill to set aside an order of the Commission shall be filed within any specific time. The order of the Commission was issued May 16, 1922; a petition for modification of the order was denied by the Commission June 12, 1922; bill herein was filed April 10, 1923. Only ten months elapsed from the denial of

that petition until the filing of the bill herein. It can not be denied that plaintiffs had an undoubted right to observe the manner in which the Central operated the properties acquired under the Commission's order. The rule has been well stated by this court in the following cases:

In *Halstead* v. *Grinnan*, 152 U. S. 412, 416; 38 L. Ed. 495, 497, this court said:

> "The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them."

In the case of *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 240; 66 L. Ed. 907, 920 this court said as to a contention that a bill brought by the United States was barred by laches:

> "The defendants contend that the suit is barred by laches on part of the government in failing to institute it earlier. Without deciding that this defense is available when an action is brought under an act of Congress embodying, as does the Sherman Act, an expression of public policy enforceable by criminal prosecution and by civil suit instituted by the Attorney-General, we are unable to discover that laches exists in the failure to more promptly prosecute the suit. The stock acquisition complained of was in 1899. In 1901 the Union Pacific acquired control of the Southern Pacific by purchase of sufficient stock to accomplish that purpose. The Union Pacific case was begun in 1908, and a final decree reached in 1913, and in 1914 this suit was begun."

The time between the entry of the order by the Commission and the filing of the bill in this case was less

than one year, while in the Southern Pacific case fifteen years had expired after the acquisition of the stock before suit was begun to set aside the acquisition.

Only upon a clear showing by the defendants that it would be inequitable to permit plaintiffs to now challenge the validity of the order, can the court sustain the plea of laches on the part of the plaintiffs. There is nothing on the present state of the record which even tends to show that any inequity will result to the defendants by reason of the delay of less than a year in bringing this suit. Plaintiffs have not been guilty of laches.

6. Courts Will Enjoin an Order of the Commission if the Same Is Unlawful in Any Respect.

The general rule as to the cases in which the District Court may enjoin an order of the Commission is stated in *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541, 547; 56 L. Ed. 309, 311, where the court said:

> "In cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." (Citing cases.)

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power."

In *Interstate Commerce Commission* v. *Northern Pacific R. Co.*, 216 U. S. 538; 54 L. Ed. 608, this court passed upon an order which the Commission had issued establishing certain through routes and joint rates between eastern points and points on the Northern Pacific, and between Portland and Seattle via the Union Pacific Railroad. The carriers sought to have the order enjoined. The power conferred by the statute upon the Commission with respect to through routes and joint rates was conditioned by the proviso that "no reasonable or satisfactory through route exists." This court held that it had the right to inquire into the question of whether or not such reasonable or satisfactory through route existed since the existence or non-existence of the fact directly affected the jurisdiction of the Commission. After reviewing the evidence the court said (page 545):

> "The condition in the statute is not to be trifled with."

If plaintiffs are correct in their contention that the Commission violated the statute, defining the power of the Commission, this court has authority to enjoin such unlawful exercise of power.

7. The Order of the Commission Is Not a Certificate of Convenience and Necessity.

It is important to note the difference between the power of the Commission to attach terms and conditions to certificates issued under paragraphs (18) to (20) of Section 1, and authorization issued under paragraph (2) of Section 5. Under the former section the Commission "may attach to the issuance of the certificate such

terms and conditions as in its judgment the public convenience and necessity may require." Under the latter section the Commission may authorize an acquisition "under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." To the certificate the Commission can attach terms and conditions that will further the public convenience and necessity. Paragraphs (18) to (20) of Section 1 deal specifically with operation or engaging in transportation over an additional or extended line of railroad, which operation is supposed to be required by present or future public convenience and necessity.

Under paragraph (2) of Section 5 the Commission may authorize acquisition by one carrier of another carrier for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises. Doubt has been expressed as to whether "such terms and conditions as shall be found by the Commission to be just and reasonable in the premises" includes anything other than financial terms or conditions as to form and manner of payments, issuance of securities, etc.

For violation of the terms and conditions attached to the certificate of convenience and necessity under Section 1, a penalty is provided by a fine of not more than $5,000 or by imprisonment for not more than three years, or both. No such penalty is attached to a violation of the terms and conditions which may be attached by the Commission to the acquisition of control authorized by the Commission under paragraph 2 of Section 5. It has been urged by some that the failure to attach a penalty to a violation of the terms and conditions attached to the authorization under paragraph (2) of Section 5 was because the terms and conditions attached to such an

authorization were in the nature of consideration from buyer to seller for a violation of which the parties would be remanded to the civil courts.

If the Commission is without authority to attach conditions relating to operation to an authorization under paragraph (2) of Section 5, such as were attached in the present case, or if there be no penalty for a violation of such conditions, it becomes important to determine whether in the present case the authority granted could by any means be construed as a certificate of convenience and necessity under Section 1, for a violation of which heavy penalties are provided by statute. In the present case, the Commission found that acquisition of the Junction Roads by the Central would be in the public interest, if the 17 conditions named in the order are observed in the operation of the Junction properties. If these conditions are ineffective,—if there is no way in which compliance therewith can be compelled, then it would appear that the public interest will not be served by the acquisition authorized by the Commission.

We now proceed to a consideration of whether the order of the Commission is a certificate of public convenience and necessity within the meaning of paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act.

The form of the order in and of itself is a complete demonstration of the correctness of this contention. The order is set forth on pages 33 and 34 of the record. The finding of the Commission is contained on pages 24 and 25, wherein the Commission states:

> "Subject to the observance of the above conditions (seventeen conditions contained in the report of the Commission, pages 22 to 24), we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest."

The language of the order follows substantially the anguage contained in paragraph 2 of Section 5, which rovides that the Commission shall have authority by rder to approve and authorize such acquisition.

Paragraph 18 of Section 1 prohibits the acquisition of line of railroad unless and until there shall have first een obtained from the Commission "a certificate that ne present or future public convenience and necessity equire, or will require, the construction or operation," tc. Paragraph 20 of Section 1 gives the Commission ower "to issue such certificates prayed for or to refuse issue, or to issue it for a portion," etc.

In a concurring opinion, Commissioner Daniels points it that he concurs in the result reached in the re- ort, but states (Rec., 25):

> "I am, however, of opinion that the report should recognize explicitly that the application should have been entertained under Section 1, paragraph 18, of the Act, and that in accordance therewith a certificate of public convenience and necessity should be incorporated in the order entered.
>
> I am authorized to state that Commissioner Campbell concurs in the views expressed above."

In a dissenting opinion of Commissioner Eastman, ncurred in by Commissioner Cox, it is stated (Rec.,):

> "There is nothing in either the report or order of the majority that purports to be or is a certificate of public convenience and necessity and it must be assumed, therefore, that the order is based on paragraph 2 of Section 5."

Under paragraph 18, as construed by the Commission its conference ruling of April 8, 1921, applications der paragraph 18 of Section 1 "are confined to new es of railroad and extensions of lines of railroad be constructed, or put in operation in interstate or

foreign commerce, by carriers subject to the Act, subsequent to the effective date of the paragraph, and to lines of railroad in existence prior to that date which were not then being used in interstate or foreign commerce."

The Commission thus limited or interpreted Paragraph 18 so that it could not apply to a railroad which had been used in interstate commerce prior to the passage of the Act, leaving Paragraph 2 of Section 5 as the only source of authority which the Commission possessed to permit one carrier to acquire the property of another carrier.

The Commission later set aside and canceled its Conference Ruling of April 8, 1921, and until the decision in *Finance Docket No. 2919, Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company* (~~not yet~~ reported), of June 18, 1923, in no case so far as we are advised has the Commission issued a certificate of convenience and necessity applicable to lines of railroad which were in operation at the time of the passage of the Transportation Act. In that case the Commission issued a certificate of convenience and necessity in the following language:

> "*It is hereby certified* that the present and future public convenience and necessity require and will require the acquisition and operation by The New York, Chicago and St. Louis Railroad Company, a consolidated corporation of the states of New York, Pennsylvania, Ohio, Indiana and Illinois of the lines of railroad described in said application and report."

To this action of the Commission, Commissioner Eastman dissented in a vigorous opinion in which he was joined by Commissioners Esch and Hall. Commissioner Aitchison did not participate in the disposition of the case; Commissioner McChord was not present when final action was taken, but indicated that he favored the adop-

tion of the report. It will thus be seen that practically the same division among the Commissioners existed in the Nickel Plate as in the Chicago Junction case. The language of the certificate in the Nickel Plate case clearly establishes the contention heretofore made that there was no certificate of convenience and necessity issued in the Chicago Junction case.

The foregoing decision of the Commission discusses the power of the Commission to permit one carrier to acquire control of another carrier; we particularly call attention to the dissenting opinion of Commissioner Eastman, concurred in by Commissioner Esch.

Had a certificate of public convenience and necessity been issued in the Chicago Junction case, the conditions attached by the Commission would have been enforceable under heavy penalties provided by Section 1 of the Act. There is no such sanction in paragraph 2 of Section 5 of the Act.

4. Acquisition of Control (a) by the Central of the River Road by Purchase of Stock; and (b) by the River Road of the Junction by Lease, Involves a Consolidation of the Central, River Road and the Junction Into a Single System for Ownership and Operation; Authorization of Such Acquisition of Control is Beyond the Power of the Commission.

a. *The application filed with the Commission shows the purpose to make the Junction and River Road a part of the system known as the New York Central Lines.*

In the application filed with the Commission by the Central it is set forth in paragraph 4, page 4 (Rec., 56), that the New York Central Railroad Company is a consolidated corporation owning and operating certain main lines of railroad, with branches extending from New

York to Chicago, and that it will be in the public interest that the Central add to and enlarge, in the manner provided for in a certain agreement, its terminals and terminal facilities in the City of Chicago. In paragraph 7, page 12 (Rec., 61, 62), the applicant stated the reasons relied upon by it as showing that it will be in the public interest that the acquisitions, leases and conveyances be consummated. Paragraph (a) points out that the River Road, the Junction and the Union Stock Yards and Transit Company make an integral whole in railroad operation, and by their connections with the lines of many other railroads entering the City of Chicago, including the Indiana Harbor Belt and the New York Central Lines, they afford the means of transporting freight to and from the Stock Yards district and industrial territory.

Paragraph 7 (b) sets forth that the New York Central Lines operating at Chicago, including therein the New York Central, Michigan Central, Big Four and Indiana Harbor Belt, vitally need in order to serve the shipping public, additional downtown terminals in the City of Chicago, which can best be developed by the acquisition of the properties of the Junction and River Road, as set out in the petition. (Rec., 62.)

Paragraph 7 (c), page 16, sets forth (Rec., 64):

> "To unite in operation the stock yards group of railroads with the New York Central connecting line facility, namely, the Indiana Harbor Belt Railroad, and with the other railroad lines under the control of the New York Central group would promote the public interest to a high degree."

The application then points out the location of the Indiana Harbor Belt, and of the stock yards group of railroads, saying (Rec., 64):

> "These respective railroad facilities are thus complements each of the other and not competitors in

public service. Each lacks important facilities which the other has and which neither could secure for itself. Handled together, co-operatively, they will create a complete terminal unit, which will serve all the industrial territory tributary to each, with higher efficiency and will develop such territory in an accelerated degree."

The application then points out the advantages to be gained by such a co-operation. The application proceeds to point out that by virtue of the connection to be developed between the New York Central Lines and Indiana Harbor Belt with the Junction Roads (Rec., 64):

"Industries and shippers and the connecting railroads reached by the outer line would have a greater and more expeditious use of the less-than-carload facilities and of the Chicago delivery facilities afforded by the Stock Yards group.

On the other hand, the vast number of industries and shippers served by the stock yards group would gain materially by having thrown open to them the use of all of the terminal facilities of the outer group, namely, the Indiana Harbor Belt Railroad and other New York Central Lines and the use for railroad development of a territory contiguous to such railroads."

Further, after pointing out that the connecting line between the Indiana Harbor Belt and the Stock Yards Roads is very little used by the Indiana Harbor Belt, the application states (Rec., 65):

"Under co-operative management this connecting line would become a valuable and material addition to the stock yards group of railroads and in what is known as 'internal circulation.'"

Finally in this paragraph it is stated (Rec., 65):

"To unite these properties in a common operation with those represented by the New York Central Lines will afford relief in the above respect by giving instant access to a large field of outside terminals."

Further, in paragraph 7 (d) (Rec., 65-67) it is pointed out that the trunk lines of the New York Central groups having termini at Chicago are the New York Central, Michigan Central and Big Four. It is alleged that the terminal facilities of these trunk lines are not wholly inadequate to properly care for traffic now moving over their lines to and from Chicago and through the Chicago gateway, but are so limited in capacity as to impede or prevent the natural flow over their lines of a large amount of freight now moving to destination either at Chicago or elsewhere over circuitous routes.

The application then sets forth the respective terminals of the Lake Shore, Michigan Central and Big Four. It is asserted that (Rec., 67)

> "the development and enlargement of the terminal facilities of the New York Central Railroad Company, of the Michigan Central Railroad Company and of the Indiana Harbor Belt Railroad Company in the manner herein proposed would be of undoubted advantage to the Big Four Company in routing over its lines much traffic naturally destined to the same and now moving by circuitous routes. By adding the Chicago Junction Railway properties as terminals appurtenant to the above named New York Central trunk lines the reciprocal effect would be produced, or provided, on the one hand, for said carriers, greatly increased capacity and efficiency for delivering, receiving and developing traffic and, on the other hand, for shippers and consignees of freight, better service and additional direct routes in the transportation of the same."

In Paragraph 7 (e) it is distinctly stated that in the foregoing has been developed (Rec., 67):

> "By reason of continuity of location, connections and good will the great value of the stock yards group of railroads and the reciprocal benefit that would accrue to the shipping public and the New York Central group of railroads by adding to the same the stock yards group as terminals."

The foregoing allegations in the application were made in an effort to show that it would be in the public interest for the Commission to authorize the New York Central to buy all the capital stock of the Chicago River & Indiana Railroad Company and for the Chicago River & Indiana Railroad to lease for 99 years, renewable at its option in perpetuity, the property of the Chicago Junction Railway Company.

The bill of complaint alleges that the testimony of the applicant before the Commission was specific to the effect that the Junction roads were to be acquired as terminals for the New York Central Lines and as a part of the System known as the New York Central Lines. (Rec., 8. 9.)

(b) *The Junction and the River Road have been operated along with other carriers constituting the New York Central Lines, under a common control and management as a single system.*

By order of March 21, 1923, *In the Matter of Recovery and payment of excess railway operating income*, under the provisions of Section 15-a of the Interstate Commerce Act, each and every carrier by railroad within the continental United States, subject to the Interstate Commerce Act, was required, on or before May 1, 1923, to report to the Commission various matters set forth in the order showing net railway operating income and the amount by which the same for the year ended December 31, 1922, was in excess of 6 per cent of the value of the railway property, held for and used by it in the service of transportation. It was further ordered that in cases where two or more carriers constitute a group under common control and management and are operated as a single system, as provided in paragraph 6 of Section 15-a of the Interstate Commerce Act, the matters referred to

in the order should be reported for the system as a whole, irrespective of separate ownership and accounting returns of the various parts of such system.

It will be observed that there is a slight difference in language in paragraph (2) of Section 5 and in paragraph (6) of Section 15-a in reference to a system of railroads. In the former, the statute refers to carriers in "a single system for ownership and operation" while in the latter the system referred to is "a group of carriers which the Commission finds are under common control and management and are operated as a single system." The test for division of excess earnings under paragraph (6) of Section 15-a of the Interstate Commerce Act is common control, management and operation as a single system. The group of carriers may be operated under some form of dominion which might be less than "ownership." It is certain, however, that ownership would come clearly within the definition of "system" referred to in paragraph (6) of Section 15-a.

It will not be denied that at all times since the acquisition of the Junction Roads by the Central, the River Road and the Junction have been operated along with the New York Central Railroad, Big Four, Michigan Central and other New York Central Lines, under a common control and management.

Perhaps the Official Guide of the Railways can be judicially noted as a standard reference book of the railways of the United States; if so, in the December, 1923, issue, at page 128, will be noted a list of the various railroads composing the system "New York Central Lines." Included in this list are 16 separate entities, the last two being Chicago River & Indiana Railroad Company and Chicago Junction Railway (C. R. & I. R. R., lessee).

An inspection of the list of officers shown for the respective component parts of the System shows that all these 16 separate carriers are under the domination and direction of common officers. The policies of each of the component parts of the system, the operation and management of each, are all controlled by the executive head of the system; in the internal organization of the system there is a common head of each department,—law, finance, traffic, purchase; all these 16 separate entities are under the common control, operation and management of the same directing force.

In Section XI of the bill of complaint it is alleged that prior to July 13, 1922, the Central acquired control as authorized by the Commission, and that "the said Central and River Road have continually operated the said railroad properties as an integral part of, and for the benefit of, the New York Central System of Railroads." (Rec., 10.) On motions to dismiss that allegation of fact stands admitted.

(c) *The phrase "not involving the consolidation of such carriers into a single system for ownership and operation" applies alike to control* (1) *under a lease;* (2) *by the purchase of stock;* (3) *in any other manner.*

Paragraph 2 of Section 5 of the Interstate Commerce Act deals solely with acquisition of control by one carrier of another carrier. This paragraph provides:

> "Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or proprety subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by ord

> to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

This paragraph, of course, does not apply where control of one carrier by another carrier had been acquired prior to the passage of the Transportation Act, 1920; there appears no prohibition in this paragraph against a change in the form of control acquired prior to February 29, 1920, such for example, as would occur where a carrier owning the capital stock of a carrier desires to lease the properties of the latter carrier.

In Finance Docket No. 1108, *Securities Application of Pittsburgh & West Virginia Railway*, 76 I. C. C. 663, 667, the Commission said:

> "Without passing upon the question whether the transaction we are asked to approve amounts to 'the consolidation of such carriers into a single system for ownership and operation,' it is clear that under paragraph (2) of Section 5 we may only approve an application for, and authorize acquisition of, the control, in whole or in part, of one or more carriers by another carrier or carriers. That provision of the law looks to the future and has no application where complete control of one carrier by another already exists. Here, applicant owns every share of the capital stock of the Belt Company and no action that we might take could give it a more complete control of that carrier."

Acquisition of control may take several forms. It may be under a lease, it may be by the purchase of stock or it may be in some other manner. The statute names the two most common forms, viz.: (1) under a lease; and (2) by the purchase of stock, but in order that the statute should be all embracing it is specifically provided that in addition to the two common forms of control, the acquisition referred to shall include control "in any

other manner." It thus appears clear that Congress dealt with control in any form. The exception "not involving the consolidation of such carriers into a single system for ownership and operation," must apply to control either by lease, by purchase of stock, or in any other manner. It would be indeed strange that Congress would have no objection to a consolidation into a single system for ownership and operation, when the control was acquired by lease or by purchase of stock, but would have objection to the consolidation if it was acquired in any other manner.

In the construction and interpretation of statutes it should always be borne in mind that common sense must prevail over strict grammatical rules, and that relative and qualifying words and phrases should be given that application which the intention of the legislature, as derived from reading the section or statute as a whole, most clearly indicates.

In *Coxson* v. *Doland*, 2 Daly 66, a provision of the metropolitan police act of New York was involved. It provided that no member of the police force "shall be liable to military or jury duty, or to arrest on civil process, nor to service of subpoenas from civil courts, whilst on actual duty." It was contended that the words "whilst on actual duty" referred only to its immediate antecedent "nor to service of subpoenas from civil courts," and did not apply to the preceding phrases in the section.

The court held, however, that the words "whilst on actual duty" did apply to all the precedents in the section and was not limited to the immediate antecedent.

In *State ex rel. Crow* v. *St. Louis*, 174 Missouri 125, 61 L. R. A. 593, 73 S. W. 623, the following provision of the city charter was before the court:

> "The assembly shall not have power to relieve any citizen from the payment of any lawful tax, or to

> exempt him from any burden imposed upon him by law, or ordain the payment of any demand not authorized and audited according to law, nor shall the assembly have power to ordain or authorize the compromise of any disputed demand, or any allowance therefor or therein, except as provided in the contract therefor, or the payment of any damages claimed for alleged injuries to person or property, except by ordinance and adopted by a vote of two-thirds of the members of each house, taken by yeas and nays."

It was urged that the assembly was absolutely prohibited from doing any of the acts specified, except to ordain the payment of any damages claimed for alleged injuries to persons or property, and that it could not do the latter except by ordinance adopted by two-thirds of the members of each house taken by yeas and nays. In other words, it was contended that the words "except by ordinance and adopted by a vote of two-thirds of the members of each house taken by yeas and nays" applied only to its immediate antecedent and not to the whole section. The court held, however, that the clause applied not only to its immediate antecedent, but to the rest of the section since there could be no reason for any other construction. It was there well said that "the reason of the law is the life of the law."

The cases above cited support the proposition that qualifying words must be applied not only to the last antecedent but also to all precedents where the nature of the provisions and the obvious sense requires it.

So in the section here under consideration it would be absurd to presume that Congress intended to permit an acquisition which involves the consolidation of carriers into a single system for ownership and operation, if such acquisition was made by lease or purchase of stock and contemporaneously intended to prohibit such acquisition if made in any other manner.

A road which is not acquired under a lease or by the purchase of stock can be acquired by the purchase of the physical property, *i. e.*, the rails, equipment, land, etc., and we cannot perceive what reason there be in permitting the acquisition under a lease or by purchase of stock and prohibiting in the same section an acquisition by purchase of the physical property.

A common sense reading of this section can lead to but one conclusion, *i. e.*, that the qualifying phrase "not involving the consolidation of such carriers into a single system for ownership and operation" applies not only to acquisition "in any other manner" but as well to acquisition "under lease" and acquisition "by purchase of stock."

(d) *Consolidation is any form of union or combination whereby a single control is exercised over properties each of which was theretofore subject to different control.*

In arriving at the true meaning of Section 5 of the Interstate Commerce Act one needs only to apply ordinary rules of construction. What were the words used by Congress and what was the intent of Congress? If the words used are plain and unambiguous reference may not be made elsewhere to determine the meaning of Congress. The rule was well stated by this court in *United States* v. *St. Paul, Minneapolis & Manitoba Railway Co. et al.*, 247 U. S. 310, 318, 62 L. Ed. 1130-1134, as follows:

> "It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment. *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 318, 41 L. Ed. 1007, 1019, 17 Sup. Ct. Rep. 540. But the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and

statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications. (Citing cases.)"

Hereafter, pages 72 to 77, we reproduce in the form of quotations from the Commission's decision *In the Matter of the Application of Pittsburgh & West Virginia Railway Company*, 70 I. C. C. 682, reference to the report of the House and Senate conferees and statements of Senator Cummins, chairman of the Senate Committee on Interstate Commerce, and Chairman Esch of the House Committee on Interstate and Foreign Commerce, from which it is clear that Congress intended that no form of consolidation, either into corporations or into systems, should be made until the Commission had announced its complete and final plan of consolidation provided for in paragraph (4) of Section 5 of the Interstate Commerce Act. There was good reason for this policy by Congress. If during the period contemplated by the Act for the Commission to perfect its plan of consolidation, carriers were permitted to pick out the desirable pieces of railway property which they wished to incorporate into their own system, it might become impossible for the Commission to so group the carriers of the country into systems as to meet the tests laid down by Congress in paragraph (4), viz.:

"The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which

the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties."

We think that Congress intended to hold railway systems in *statu quo* of February 29, 1920, until the Commission had perfected its plan of consolidation; after such plan had been perfected then such consolidations could be made as were in conformity with the Commission's plan.

With these purposes in mind we come now to consider the meaning of the provisions of Section 5, particularly paragraph 2 thereof, which authorized the Commission to permit one carrier to acquire another, if such acquisition did not involve consolidation of such carriers into a single system for ownership and operation. Our contention in the present case is supported both by the dictionary meaning of words used by Congress and by the interpretation which the Commission has made in other cases.

Webster's New International Dictionary defines "consolidate" as follows:

"To unite, as various particulars into one mass or body; to bring together in close union, to combine, as to *consolidate* the armies of the republic.

As synonyms: Unite, combine."

Webster's New International Dictionary defines the word "system" as follows:

"An aggregation or assemblage of objects united by some form of regular interaction or interdependence; a natural combination or organization of part to part, conceived as formed by a process of growth or as due to the nature of the objects connected; an organic whole; as, the solar *system;* a *system* of railways."

The Commission has defined "consolidation" as referred to in Section 5 of the Interstate Commerce Act, the leading case perhaps being *In the Matter of the Application of Pittsburgh & West Virginia Railway Company*, 70 I. C. C. 682 (decided Dec. 10, 1921). At page 684 the Commission states:

> "Technically, a consolidation is sometimes defined as a union of companies where a new corporation is created to take over the powers and property of the consolidating corporations. We are of the opinion, however, that the word 'consolidate' is not used in paragraph (6) in a narrow sense, but that the language of the paragraph is broad enough to cover any form of union under which 'properties theretofore in separate ownership, management, and operation' pass into the possession of a single corporation for ownership, management, and operation. This matter is not of immediate importance, for if the proposed purchase falls outside the terms of paragraph (6), it is certainly covered by paragraph (2), which deals with the acquisition by one carrier of the control of another 'either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation.' The question has a prospective importance, however, if we decide that authorization of the purchase is necessary under Section 5, for no such authority may be granted under paragraph (6) until we have adopted a plan of consolidation under paragraphs (4) and (5), while there is no similar limitation upon action under paragraph (2).
>
> But applicant has not sought authority for the purchase and sale under Section 5, and the immediate question, as aforesaid, is whether the transaction can lawfully be consummated without such authorization. Two constructions of the above-quoted provisions of that section are possible. One interpretation is that they represent an attempt on the part of Congress to place in our hands complete control over the union of carriers engaged in interstate commerce; the other is that they are merely a means of affording relief from the operation of the 'anti-

trust laws,' or other restraining State or Federal statutes.

Section 5 is a unit, its separately numbered paragraphs dealing with analogous matters. Paragraph (1), which has to do with the pooling of freights and the division of earnings, begins as follows:

'(1) That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of Section 1 of this Act, it shall be unlawful for any common carrier, subject to this Act to enter into any contract, * * *'

It is thus definitely and unmistakably provided that an agreement for the pooling of freights or the division of earnings shall be unlawful unless and until it receives our specific approval. The corresponding language of paragraph (2), which deals with union of carriers not involving consolidation into a single system for ownership, management, and operation, is not so easily construed. It contains no specific prohibition, but provides that whenever we are of opinion that it will be in the public interest, we shall have authority by order to approve and authorize such union. The language of paragraph (6) is similar, for while it specifies the conditions under which consolidations 'shall be lawful,' it does not in terms state the conditions under which they shall be unlawful.

The provisions in question were made a part of the interstate commerce act by the transportation act, 1920. In case of ambiguity it is permissible, in interpreting a statute, to refer to the reports of Congress. The final draft of the transportation act, 1920, was the result of a conference between the Senate and House committees. In the report of the House conferees, February 8, 1920, it was said:

'The House bill permitted consolidations, mergers, and pooling of earnings or facilities, subject to the approval of the commission, and for the purpose of carrying out any order of the commission approving a consolidation, merger, or pooling declared that the carriers affected by such order should be relieved from the operation of the anti-trust and other restrictive or prohibitory laws. The Senate amendment in Section 9 declared that it is the policy

of the United States to require consolidation of all the railroads of the country into not less than 20 nor more than 35 separate systems, and provided (Sec. 10) that the transportation board should prepare a plan for such consolidation. Voluntary consolidations were provided for within the period of seven years after the passage of the act, but at the end of that period the transportation board was given power to compel such consolidations. The Senate receded from the provisions for compulsory consolidation and agreed to the House provisions with respect to pooling, as revised by the conferees. The House agreed to the Senate provisions for voluntary consolidations as revised by the conferees in Section 407 of the conference report. Under these provisions the commission is authorized to permit the acquisition by one carrier of the control of another by lease or purchase of stock. The commission is directed to prepare a plan of consolidation, preserving existing routes and competition so far as possible. Before adopting such plan the commission is required to give a hearing and notify the governor of each state affected. *Consolidations or mergers in harmony with the commission's plan are permitted subject to the approval of the commission and subject to the requirement that the capital of the consolidated corporation shall not exceed the value of the consolidated properties as determined by the commission.* An order of the commission approving a specified consolidation may be carried out notwithstanding any State or Federal restraining or prohibitory law to the contrary. (Italics ours.)'

In making the report for the Senate conferees, Senator Cummins said, on February 23, 1920:

'In so far as the Senate bill contemplated compulsory consolidations, the Senate conferees have found it necessary to recede, but the real principle embodied in the Senate bill has been preserved. The substitute found in the conference report upon this subject provides that the commission shall, as soon as practicable, adopt and publish a plan for the consolidation of our railways into a limited number of systems, with the same requirements as to competitive service and the observance of existing routes of commerce as were laid down in the Senate bill.

With the approval of the commission, guided solely by the public interest, consolidations are to be permitted, but they are to be voluntary and must be consistent with and in furtherance of the plan adopted by the commission. Furthermore, in whatever consolidations may take place, the properties consolidated must be treated as of their true value, and the commission is charged with the duty of determining this value under the valuation act of 1913. (Italics ours.)'

Still more definite were the remarks of Chairman Esch, of the House committee, on February 21, 1920:

'No consolidation can hereafter be made unless it complies with the plan as prescribed by the commission. We have safeguarded this matter of consolidation in every possible way.'

Aside from this extraneous evidence, the intent of the provisions may, we think, be determined by reference to internal evidence. Paragraphs (4) and (5) provide most elaborately for the preparation and adoption by the commission of a 'plan for the consolidation of the railway properties of the continental United States into a limited number of systems.' In the division into such systems 'competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained.' It is further provided that the 'several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.' When we have agreed upon a tentative plan of this character, it must be given 'due publicity,' including notice to the Governor of each State, and all persons must be heard who may file or present objections. Thereafter, and not until then, the final plan may be adopted and published.

Obviously, the preparation and adoption of a plan of consolidation under such instructions from Congress require deliberate and careful consideration

of every railway property of the 'continental United States' from competitive, financial, commercial, and other points of view, so that each such property may with nicety be fitted into its appropriate place in the final scheme. Obviously, also, many consolidations which are not barred by the restraining provisions of the 'anti-trust laws' or other Federal or State statutes may be wholly inconsistent with the plan and destructive of its purpose. Yet, if consolidations of this kind can now be lawfully effected without our approval, the conclusion is inevitable that the carriers may ignore section 5 with impunity under similar circumstances, after the plan has finally been adopted, and thus bring quick disaster to its entire structure. It is impossible to believe that it was the intent of Congress to prescribe with such care the method by which this elaborate and comprehensive program shall be formulated and the principles by which it shall be governed, and at the same time leave open a door by which at any time it may be wrecked.

And the same may be said of the intent of paragraph (2), for if carriers are permitted to gain control of one another without our approval by means falling short of consolidation and in a manner which is out of harmony with the ultimate plan of consolidation, to that extent the difficulties in the way of the consummation of the plan will be increased and the probability will be diminished that it may ultimately be accomplished through voluntary action of the carriers.

Beyond question, in the development of the transportation act, 1920, as a constructive measure for the solution of the railroad problem, great importance was attached by Congress to the ultimate consolidation of the carriers into a limited number of great systems, well balanced financially and of similar earning power, but competing with each other and maintaining the existing channels of trade and commerce. In our opinion it was the intent of Congress that complete control over the situation should be in our hands, so that the working out of this constructive policy might be safeguarded in every possible way, and so that consolidations or other union

of interests might not be effected without our consent.

Nor is the language of Section 5 inconsistent with this conclusion. In Lewis' Sutherland on Statutory Construction it is said, at pages 1149-1150:

'A direction contained in a statute, though couched in merely permissive language, will not be construed as leaving compliance optional, when the good sense of the entire enactment requires its provisions to be deemed compulsory.'

But it is unnecessary to rely upon this principle of construction, for when, in paragraph (6), it is provided that 'it shall be lawful' to consolidate under certain conditions, this is but another way of saying that consolidations in disregard of those conditions shall be unlawful. And in like manner, when it is provided in paragraph (2) that we may authorize the acquisition by one carrier of control of another in any manner falling short of consolidation, whenever we are of opinion that such acquisition 'will be in the public interest,' this is equivalent to saying that authority for the acquisition shall not exist under other conditions.

If it had been intended that these provisions of Section 5 should merely afford a means of escaping from the restraints of the 'anti-trust laws' and other State or Federal statutes, much simpler machinery would have been devised for accomplishing the purpose. The 'plan of consolidation' is incompatible with such an interpretation of the section and embodies a policy of far greater breadth and vision."

In the Commission's report on *Consolidation of Railroads*, 63 I. C. C. 455, at page 635, in the resume of consolidation policy, Professor Ripley outlines the objects sought in the tentative plan proposed by the Commission as follows:

"An inherently natural geographic scope for each system; a sound operating adaptation of each unit to its surroundings, due consideration being given to the nature of its traffic; administrative practicability, that is to say, a size under each particular set of circumstances, commensurate with human capacity in management; an ever-present competition

between rival roads, in order to insure the continuance of an alert and accelerated service to the public, assuming that the foregoing physical arrangements have already provided economical carriage by each competitor; and such an equalization of earning capacity between these competitors, as to perpetuate such rivalry in service on an even-handed and wholesome basis. This ideal has been otherwise well described by Chairman Clark of the Interstate Commerce Commission, as a service 'rendered by large systems with their component parts properly coordinated under a common policy rather than by a substantial number of weaker and, in some instances, impecunious systems, each with its selfiish interests and its separate organization striving to promote those interests.' All of these requisites for a sound consolidation plan, it should be understood, must of necessity be combined with the least possible disturbance of existing corporate integrity."

In the Commission's tentative plans for *Consolidation of Railroads*, 63 I. C. C. 455, at page 483, it is said:

"Another far-reaching assumption is vital to the success of this plan. This has to do with the operation of terminals at great centers. Historically, there has been the greatest diversity of experience in this regard between the carriers of the country. Some roads are peculiarly fortified as to terminals, while possessing weak lines from an operating standpoint across the open country. For others, the reverse is true. Some companies, entering the field late, enjoy good locations as to line, but have always worked under a handicap at the terminals. Such lines are strong in the open but weak at the ends. Others—The Atlanta, Birmingham & Atlantic, for example—were really constructed across country rather to utilize an existent terminal than because of a demonstrated need for the new cross-country line. But whatever the cause for the existing situation, a practically universal demand of shippers is that they be able freely to exercise their routing rights by the provision of open terminals, both at the point of shipment and at destination. The right of route across country is impaired if the only possible delivery is at an inconvenient point. To put

together railway lines on the map without having a constant regard to the possibility of free delivery or receipt at either end would indeed be futile. As to the particular means for accomplishment of this object—free and untrammeled utilization of terminals—there may well be difference of opinion. Conceivably, joint ownership and operation, as at St. Louis, may succeed in that environment, while reciprocal switching may satisfactorily answer the purpose as at Chicago. But, whatever the means adopted to this end, it is submitted that a proper adjustment of the various terminal situations, always of course for due compensation, is an important adjunct to any comprehensive consolidation plan. No recommendation, therefore, as to particular terminal remedies is offered in this report. The subject technically is so involved, that it might well be made matter for a special investigation. Its bearing upon and relation to the subject of the division of through rates is as obvious as is its intimate connection with consolidation. The pending New York Central application to acquire the Chicago Junction Railway raises in itself almost all the possible aspects of terminal problems. Consolidation can never be effectively brought about without the adoption of a comprehensive policy as to terminal ownership, operation, or both. It is herein assumed that free access will be somehow provided, either under the present emergency powers as contained in Section 1, Paragraph 15c, or by the adoption under a consolidation plan of permanent arrangements in all of the important centers. Possibly the assignment of terminal properties might take place by means of leases based upon valuation by the Commission and at a rate fixed by the Commission as reasonable. This would permit the terminal companies to remain under the joint control of the several participating railroads, rather than that entirely independent terminal companies, actually owning these facilities, should be set up. The important point, whatever the means adopted to this end, is that there should be unified operation and entirely free access to all participants alike."

In line with this policy, in the same opinion, the Com-

mission in announcing its finding of the New York Central System, page 456, excluded the Indiana Harbor Belt, now controlled by the New York Central 30 per cent, Michigan Central 30 per cent, Chicago & Northwestern 20 per cent, and Chicago, Milwaukee & St. Paul 20 per cent, saying: "The Indiana Harbor Belt is reserved for consideration in connection with terminal situations."

What the Commission regards its power to authorize consolidations into *systems* and into single corporations appears in the following decisions.

We find it impossible to harmonize the action of the Commission in the report and order here under attack with action which it has taken in other cases where applications were made under paragraph (2) of Section 5.

In Finance Docket No. 2592, *Merger of Subsidiary Companies with Boston & Maine*, 76 I. C. C. 797, the Commission dismissed the application of the Boston & Maine Railroad for authority to acquire by merger the corporate property, rights, credits and franchises of various subsidiary companies, at least a majority of whose capital stock was owned by the applicant, as being beyond the power of the Commission under paragraph (2) and as premature under paragraph (6). The Commission said (page 799):

> "If the applications be treated as having been filed under paragraph (2) of Section 5 of the Interstate Commerce Act, we are of the opinion that that paragraph does not confer upon us the power to approve or authorize the proposed transactions. The contemplated mergers would involve the consolidation of the applicant and the subsidiary companies into a single system for ownership and operation and, therefore, we are without jurisdiction under that paragraph to approve or authorize the same.
>
> If the applications be considered as having been presented under paragraph (6) of said Section 5 they cannot be entertained by us at the present time. That paragraph confers upon us jurisdiction to ap-

prove a proposed consolidation of the properties of two or more carriers into one corporation for ownership, management, and operation, but it provides that the proposed consolidation must be in harmony with, and in furtherance of, the complete plan of consolidation mentioned in paragraph (5) of said section. While we have agreed upon the tentative plan of consolidation provided for by paragraph (4) of that section, and given due publicity thereto, the hearings which we are required by said paragraph (5) to hold thereon have not yet been brought to a close and the complete plan of consolidation has not yet been adopted by us. We are of the opinion, therefore, that the filing of the applications was premature if it was intended thereby to invoke our jurisdiction under said paragraph (6).

* * * * *

There is, we believe, no provision of law pursuant to which we may at this time approve or authorize the proposed mergers, and it follows that the applications should be dismissed."

In Finance Docket No. 1881, *In the Matter of the Application of the Western Pacific Railway Company for Authority to Acquire Control of the Sacramento Northern Railroad and to Purchase its Bonds*, 71 I. C. C. 653, the Commission denied the application for the reason that until application has been made under Section 20-a of the Interstate Commerce Act for authority to issue capital stock, and to assume obligations of the old company, the Commission was unable to pass upon the question of public interest involved in the acquisition of control of such company by the Western Pacific. In the course of its opinion, the Commission said:

"It is asserted that the lines of the (Sacramento) Northern will be 'independently' operated by a separate operating organization. The record shows unquestionably, however, that the new company would be merely an instrumentality of the Western Pacific organization, responsive necessarily to the policies established by it and operated primarily in its interests. The acquisition of control by the applicant

under the circumstances proposed would *ipso facto* establish the status of the new company as part of the Western Pacific system and so long as the control continued its operation would necessarily be as part of that system. See *So. Pac. Terminal Co.* v. *Int. Comm. Comm.*, 219 U. S. 498."

Thereafter, on July 2, 1923, 79 I. C. C. 782, on an additional record on rehearing, the Commission reaffirmed its findings, and in greater detail discussed the question of whether, if the application of the Western Pacific were granted the Sacramento Northern Railway would be operated "as a part of a general steam railroad system of transportation." After pointing out that the record showed that the proposed acquisition was for *system purposes*, the Commission said: 788

"The term 'system' is comprehensive. A reference to the lines of the New York Central Railroad Company might be regarded as restricted to lines owned by such company. A reference to lines of the New York Central System, however, would include the numerous lines controlled by the New York Central Railroad and operated *as part of* that system, even if operated by organizations separate from that operating the New York Central Railroad Company lines proper. In the original report in the present case adopted by division 4, reference was made to *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 210 U. S. 498, as an authority for the proposition that the new Sacramento Northern company would henceforth be merely an instrumentality of the Western Pacific organization, responsive necessarily, to the policies established by it, and operated primarily in its interests, and therefore operated as part of its system. The facts of this case are discussed more at length in the report of the same case before the Commission, *Eichenberg* v. *Southern Pacific Company*, 14 I. C. C. 250, 265. * * * After pointing out that the Galveston, Harrisburg & San Antonio was also controlled by the Southern Pacific Company, we said, on page 265:

'It is true that the different corporations under consideration are operating under separate and dis-

tinct charters, but, nevertheless, they constitute a single system. To complete that system the Terminal Company is a necessary part. * * * The Terminal Company is part and parcel of the system engaged as a whole in the transportation of commerce, and to the extent that such commerce is interstate, the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all their terminals and terminal facilities from our regulating authority.'

Referring to the fact that the terminal company and the rail carrier paid each other for the respective services performed by each for the other, we said, on page 266:

'It is true that the latter collects a trackage charge from the former and that the railroad company collects a switching charge from the Terminal Company. These charges are, however, but incidents of *the separate corporate operations.*' (Italics ours.)

In the case before us, it is pointed out that there will be divisions of joint rates between the Sacramento Northern and the Western Pacific in the future as now and formerly. In our opinion, this has no more bearing upon the question of system control and operation that the payment of switching and trackage charges had in the Southern Pacific Terminal Case.

The Supreme Court, after reviewing the facts in *Southern Pacific Terminal Company* v. *Interstate Commerce Commission, supra*, said on page 521:

'Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation *through* the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the terminal company is a wharfage company, or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the terminal company have

united them into a system of which all are necessary parts, the terminal company as well as the railroad companies.' (Italics ours.)

And again, on page 523:

'In opposition to these views appellants urge the legal individuality of the different railroads and the terminal company, and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record does not present a case of stock ownership merely, or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the terminal company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it.'

Bearing in mind that the terminal company was in fact separately operated by a separate organization from the railroad company and from the holding company, the statement of the Supreme Court that 'there is a union of them if we regard their control and operation *through* the Southern Pacific Company' is very significant. The fact of separate operation afforded no hindrance to the conclusion that the separate companies were operated as part of one system. 'They are directed by the same paramount and combining power and made single by it.'

Applying this reasoning to the case before us, it is impossible to escape the conclusion that the Sacramento Northern will be operated as part of the Western Pacific System. The statements made by the applicant as to economies to be effected by changing points of interchange, by joint solicitation of traffic, by joint use of tracks and terminal facilities, and the statement made as to the necessity for the acquisition of the Sacramento Northern by the Western Pacific, and the intention to use the Sacramento Northern lines as a feeder to the Western Pacific, giving the latter access to important points which the Western Pacific does not now reach, all

go to show that the proposed acquisition is for system purposes, and that the lines, if acquired, would henceforth be operated as part of the Western Pacific system, which is a general steam railroad system of transportation within the meaning of the statute."

The foregoing citations to decisions of the Commission indicate a closer appreciation of the Congressional intent than is evidenced in the report and order here under consideration.

In Finance Docket No. 2613, *Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508, the Commission approved and authorized acquisition of control by the Southern Pacific of the Central Pacific Railway Company by lease and stock ownership. In that case application was filed by the Southern Pacific Company for authority under Paragraph (2) of Section 5 of the Interstate Commerce Act to acquire control by lease and stock ownership of the Central Pacific Railway Company, a copy of the proposed lease being filed with the application. The application recited that the occasion therefor was the decision of this court in *United States* v. *Southern Pacific et al.*, 259 U. S. 214, holding that existing control by the Southern Pacific of the Central Pacific was prohibited by the federal anti-trust act of July 2, 1890, known as the Sherman law. On page 524 of the Commission's decision it is stated:

"The question has been raised as to whether an acquisition of control under the circumstances proposed amounts to a consolidation of the carriers concerned 'into a single system for ownership and operation,' as to which type of control we have no jurisdiction under paragraph (2) of Section 5. We have given consideration to the question and find that an acquisition of control consummated as proposed and exercised subject to the conditions to be imposed by our order herein, does not involve the consolidation of such carriers into a single system

> for ownership and operation. It is not enough to constitute such a consolidation that the carriers or their properties be consolidated into a single system for operation, or for management, or for management and operation, but it must also appear that they are consolidated for ownership. Since each of the carriers will retain its corporate identity and the legal title to its property, no consolidation of the kind defined by the statute will result."

In the concurring opinion of Commissioner Eastman, it is pointed out that the control authorized by the Commission's decision differs from that which had been authorized in other cases, in that the control was held subject to a contingency named in the order, viz., "that the control herein authorized by lease and stock ownership shall be held subject to termination by order of the Commission if and when found by this Commission to interfere with the consummation of its complete plan of consolidation under the provisions of Section 5 of the Interstate Commerce Act." This court will recall that in its decision in the *Southern Pacific Case*, 259 U. S. 214, at page 232, it had found a common ownership and control amounting to practical consolidation. We can not find in Paragraph (2) of Section 5 any limitation as to the period during which the consolidation into a single system may continue. That there is a possibility that the Commission might at some future time revoke the authority granted to the Southern Pacific cannot affect the degree of consolidation resulting from the acquisition authorized by the Commission.

One of the sources for light upon the meaning of terms in a Congressional enactment is judicial definition prior to such enactment. Let us see what was the judicial interpretation of "consolidation" and "system" prior to the passage of Act under consideration.

In the case of *East St. Louis Connecting Railway Co. et al.* v. *Jarvis*, 92 Fed. 735, Circuit Court of Appeals for

the Seventh Circuit, held that the lease of the Venice & Carondelet Railway Company to the East St. Louis Connecting Railway Company for ten years was a "consolidation" within the meaning of Article 11, Section 11, of the Constitution of Illinois, which provides that:

> "No railroad corporation shall consolidate its stock, property or franchise, with any other railroad corporation owning a parallel or competing line."

At page 743 the court said:

> "Is a lease for 10 years a consolidation of the franchises or property, within the constitutional provision? It is contended that the term 'consolidation' means a permanent union of the interests, management, and control of two roads, either in the formation of a new company out of the consolidated one, or else by consolidated management of the old ones unitedly while their distinct corporate entities still remained. This distinction is true in the general sense in which one speaks of the 'consolidation' of railroads. The term may also mean the act of forming into a more firm or compact mass, body, or system. The constitutional convention, representing the people of the State, sought to provide against monopolies, and to preserve to the public the benefit that would accrue from competition between parallel or competing lines of railway. It sought for practical results. It intended to provide that parallel or competing lines should continue to be competing, and this it aimed to accomplish by prohibiting the consolidation of the stock or the franchises or the property of any such competing lines of railway. The union of such lines was prohibited, in view of the objects sought to be accomplished. The term 'consolidate,' we think, must be construed to have been used in the sense of 'join' or 'unite.' To permit two such competing lines of railway under a single management and a single control would accomplish the very purpose which the constitution sought to prevent. We must have regard to the spirit and the object of that constitutional provision, and not juggle with the technical meaning of the word. The prohibition goes to the

consolidation or uniting of the stock of two competing roads, or of the franchises of two competing roads, or of the property of two competing roads. The doing of either would create the prohibited monopoly, and either is within the intendment and meaning of the constitutional provision. Nor do we think that there is force in the contention that this union or consolidation was by means of a temporary arrangement, if thereby that is accomplished which is prohibited by the constitution. If it be lawful, by means of a lease for 10 years, to consolidate and unite the properties of competing lines of railway, we perceive no reason why a lease for 99 years would not be equally valid. We cannot draw the line in that respect between what is permanent and what is temporary. Whatever produces the prohibited result is obnoxious to the spirit and the letter of the constitutional provision, and is illegal. We must deal with the result accomplished, without regard to the means employed. It cannot be permitted that one may effect a prohibited result by indirection which he may not lawfully accomplish by direct means. We must therefore hold that the leases in question practically effected a consolidation of the properties of two competing lines, and are within the inhibition of the constitution. *Morrill* v. *Railroad Co.*, 55 N. H. 531; *Gulf, C. & S. F. Ry. Co.* v. *State*, 72 Tex. 404, 10 S. W. 81; *State* v. *Atchison & N. R. Co.*, 24 Neb. 143, 38 N. W. 43."

In *United States* v. *Southern Pacific Company, et al.*, 239 Fed. 998, the District Court, Sanborn, Hook and Carland sitting, dismissed a bill by the United States against the Southern Pacific, et al. In the course of the opinion the court frequently referred to the Southern Pacific System as the Southern Pacific Lines. The court traced the history of the Central Pacific and Southern Pacific Companies. At page 1000 the court points out that the Central Pacific was dominated and controlled by certain men who were in that year, if not earlier, in control of the Southern Pacific, saying:

"For at least fifteen years thereafter, and during the most important constructive period of the Southern Pacific, a common control and dominance over both companies was exercised by them or the representatives of their estates. * * * Except as to corporate title and bookkeeping, there were generally the aspects of a single enterprise. In this respect the conditions were not unlike those which have characterized the growth of many of the important railroad systems of the country in which for necessity or convenience of financing and in some instances because of local laws, separate corporate organizations were utilized. * * * Up to 1885 all the Southern Pacific railroads, including the main line to New Orleans (with an unimportant exception), were officially announced, advertised, and operated by the Central Pacific as part of its system. The legal relation between the two companies was expressed in executed leases, and the system was known as 'Central Pacific Railroad and leased lines.'"

On appeal to this court, *United States* v. *Southern Pacific*, 259 U. S. 214, 66 L. Ed. 907, the decree of the District Court dismissing the bill was reversed. This court reviews the facts and points out the manner in which the Southern Pacific System was developed. It is particularly pertinent to observe the language of the opinion after pointing out what was said by the District Court, that perhaps as early as 1870 the same group that controlled the Central Pacific gained control of and continued to dominate the policy of the Southern Pacific (page 232):

"The roads were always separate and distinct corporations; they were so recognized in the acts of Congress making land grants to them, authorizing their construction and operation from one State or Territory to another, and otherwise conferring rights on them which only Congress could confer. For a good part of the time the roads had boards of directors not consisting of the same persons. At times the majority of the stock was separately held.

> In the Central Pacific, when the lease of 1885 to the Southern Pacific was made, only one-fourth of the stock was held by the group to which we have referred. It had been sold and was widely owned in the United States and Europe. The dominating control was maintained from the fact that the stock had not been transferred by its true owners on the company's books, and much of it was held in the name of employes who were used in voting it by the original promoters, their successors and survivors.
>
> We can not accept the theory of prior practical consolidation as a justification for a violation of the Sherman Act resulting from the stock control acquired in 1899."

It is clear from this quotation that notwithstanding separate corporate entity the Southern Pacific and Central Pacific had been consolidated into a single system. Applying this precedent to the present case it is clear that the River Road and Junction have been consolidated into the New York Central System.

In the *Northern Securities Case*, 193 U. S. 197, 48 Law Ed. 679, this court ordered the dissolution of the Northern Securities Company, a holding corporation, which had been formed to hold the stock of the Great Northern and Northern Pacific. In the course of the opinion the court refers to the ownership of stock and answers the contention that Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporation be engaged in interstate and international commerce. The decree in that case against the Northern Securities Company and its officers, agents, servants and employes, is very similar to that which we are asking in the present case. There the court molded its decree so as to accomplish practical results—such results as law and justice demanded.

In the concurring opinion of Mr. Justice Brewer, after

pointing out that a corporation is an artificial person, created and existing only for the convenient transaction of business, it is further stated (page 362):

> "In this case it was a mere instrumentality by which separate railroad properties were combined under one control. * * * If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could the control of all the railroad companies in the country be placed in a single corporation."

In the dissenting opinion of Mr. Justice White, with whom concurred Chief Justice Fuller, Justice Peckham and Justice Holmes, there is reviewed the development of systems of railroad. That opinion points out (page 375, 48 L. Ed., 715):

> "It also may not be doubted that from the beginning the various States of the Union have treated the incorporation and organization of railroad companies and the ownership of stock therein as matters within their exclusive authority. Under this conception of power in the States, universally prevailing and always acted upon, the entire railroad system of the United States has been built up. Charters, leases, and consolidations under the sanction of state laws lie at the basis of that enormous sum of property and those vast interests represented by the railroads of the United States. Extracts from the reports of the Interstate Commerce Commission and from a standard authority on the subject, which were received in evidence, demonstrate that in effect nearly every great railroad system in the United States is the result of the consolidation and unification of various roads, often competitive, such consolidation or unification of management having been brought about in every conceivable form, sometimes by lease under state authority, sometimes by such leases made where there was no prohibition against them, and by stock acquisitions made by persons or corporations in order to acquire a controlling inter-

> est in both roads. Without stopping to recite details on the subject, I content myself with merely mentioning a few of the instances where great systems of railroad have been formed by the unification of the management of competitive roads, by consolidation or otherwise, often by statutory authority. These instances embrace the Boston & Maine system, the New York, New Haven & Hartford, the New York Central, the Reading, and the Pennsylvania systems. One of the illustrations—as to the New York Central System—is the case of the Hudson River Railroad on one side of the Hudson River and the West Shore Railroad on the other,—both parallel roads and directly competitive, and both united in one management by authority of a legislative act. * * * As a matter of public history it is to be observed that not long since by authority of the legislature of the State of Massachusetts, a controlling interest by lease of the Boston & Albany road passed to the New York Central System."

Upon the foregoing, so far as expressions of fact are concerned, there was no indicated difference of opinion among the justices of the court. The dissent was wholly as to the power in Congress to control ownership of stock. The dissenting opinion, as well as the majority opinion, fully recognizes that consolidations could be made either by leases or by stock ownership.

In the case of *Chicago, Milwaukee & St. Paul Railway Co. et al.* v. *Minneapolis Civic and Commerce Assn.*, 247 U. S. 490; 62 L. Ed., 1229, this court held that the rule that ownership alone of capital stock in one corporation by another does not create an identity of corporate interest between the two companies, or render the stock holding company the owner of the property of the other, or create the relation of principal and agent or representative between the two, is not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of the corporation in the normal and usual manner, but for the purpose of con-

trolling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. This decision of this court is peculiarly significant when we consider that in the application filed by the Central with the Commission it is expressly stated that it is desired to acquire the River Road and the Junction as terminals for the lines constituting the System known as the New York Central Lines.

In *Louisville & Nashville Railroad Company* v. *Kentucky*, 161 U. S. 677, 40 Law Ed., 849, this court affirmed an opinion of the Court of Appeals of Kentucky which held unlawful a consolidation effected by the Louisville & Nashville acquiring control of the capital stock, franchises and property of the C. & O. Southwestern, and other railway lines in Kentucky. The state court had held the proposal to violate Section 201 of the State Constitution of Kentucky, which provides:

> "No railroad, telegraph, telephone, bridge, or common carrier company shall consolidate its capital stock, franchises, or property, or pool its earnings, in whole or in part, with any other railroad, telegraph, telephone, bridge, or common carrier company owning a parallel or competing line or structure."

In that case, the consolidation referred to in the opinion was to be brought about by purchase of capital stock, as well as by purchase of physical properties. The consolidation referred to was the bringing together of theretofore separate properties under the management and direction of the Louisville & Nashville.

The foregoing opinions clearly indicate that the use of the word "consolidate" or "consolidation" implies the bringing together under a single control, either by lease, purchase of physical property, or acquisition of the stock of a holding company which in turn holds the stock or properties of subsidiary corporations. That this is so

is abundantly shown by the fact that in paragraph (6) of Section 5 the Congress deals specifically with the consolidation into a single corporation, while in paragraph (2) the consolidation is into a single system.

Under Paragraph (2) of Section 5 the Commission may authorize acquisition of control only in a "manner not involving the consolidation of such carriers into a single system for ownership and operation," so that the Commission's order in this case was beyond its authority if it allowed consolidation into a single system for ownership and operation even though such consolidation fell short of the consolidation provided for by Paragraph (6) of Section 5 "into one corporation for the ownership, management and operation of the properties."

Clearly Congress had in mind in its reference to system of railroads, the union of various lines of railroad under a common directing head so that the returns upon the investment and the relationship to the public and to other railroads would be in one common central control. The New York Central Railroad Company is the principal corporation in the system. While that corporation does not own all of the stock of all of the system line corporations, it does own all of the stock of the River Road.

9. The Order of the Commission Is Void if It Authorizes the Consolidation of the Properties of the River Road and the Junction Road Into a Single Corporation in Violation of Paragraph (6) of Section 5, Because the Commission Had Not (Has Not Yet) Perfected Its General Plan of Consolidation.

We have already seen that the effect of the Commission's order is to permit the River Road to lease the physical properties of the Chicago Junction Railway Company for 99 years, renewable in perpetuity at the

option of the River Road. Paragraph (6) of Section 5 provides:

> "It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions: (a) the proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the Commission;" (Here follow other conditions).

We come first to a consideration of whether the consolidation is of properties "theretofore in separate ownership, management and operation." The properties acquired by the River Road under the lease were owned (a) by the Chicago Junction Railway Company, in part, and (b) by the Union Stock Yards & Transit Company in part. All the stock of the Chicago Junction Railway Company and the Union Stock Yards & Transit Company was owned by the Chicago Junction Railways and Union Stock Yards Company, a New Jersey holding company. The railway properties of the Chicago River & Indiana Railroad Company were owned by that corporation, the stock of which was owned in equal parts by Richard Fitzgerald, an individual, and the Chicago Junction Railways and Union Stock Yards Company. These two railroads were separate properties, separately owned, operated and managed. These corporations made separate reports to the Commission and in every way were in separate ownership, management and operation. Separate ownership, operation and management of the Chicago Junction and Chicago River & Indiana Railroad properties, is set forth on pages 4 to 7 of the application to the Commission. (Rec., 57.) The only corporation that is to own the consolidated properties is the Chicago River & Indiana Railroad Company.

If it be urged that control by a lease for 99 years, renewable in perpetuity at the option of the River Road is not "ownership by the River Road," we reply that we must have regard to the spirit and the object of the statute and not juggle with the most refined technical meaning of the word. If control of railway property may be acquired by a corporation under a lease for 99 years renewable at its option in perpetuity without complying with paragraph (6) of Section 5 a way is open to carriers to bring about by this device the very result which Congress attempted to prohibit. Such a construction of the statute is not possible of justification. What more effective consolidation can be made than is authorized by the second paragraph of this order of the Commission?

It is thus plain that the lease for 99 years, renewable in perpetuity at the option of the lessee, is an actual consolidation of the properties of the Chicago Junction, owned and leased, and the owned properties of the Chicago River & Indiana Railroad Company, as well as the trackage rights of that company. When paragraph (6) states that it shall be lawful for two or more carriers to consolidate their properties under certain named conditions, it is in effect a statement by Congress that unless the conditions are complied with the consolidation is unlawful. Inasmuch as the Commission has not published its complete plan of consolidation, mentioned in paragraph (5), it is plain that consolidation cannot be made under paragraph (6), and that the order of the Commission cannot be sustained under said paragraph; therefore the approval of the Commission is void.

10. The Order Is Void Insofar As It Permits the River Road to Lease the Properties of the Junction, Because Neither the River Road Nor the Junction Road Made Any Application to the Commission for the Authorization Contained in the Order.

We have already seen that the only application filed with the Commission was that of the Central. The applicable provision of the statute in this respect is Paragraph (2) of Section 5:

> "Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease, etc."

The statute deals with acquisition. The application to acquire must be made by the carrier which proposes to acquire and probably by the carrier, which is to be acquired. At the time of the filing of the application, of the hearing before the Commission, and at the time the Commission announced its decision, the New York Central had absolutely no interest, legal or equitable, in the Chicago River & Indiana Railroad Company. It was at most a prospective stockholder. No authority could be exercised by the New York Central as a prospective stockholder. This point was urged before the Commission, but at no time did the Chicago River & Indiana Railroad Company make an application to the Commission. It is true it was represented at the hearing, but such representation in no way constituted the application referred to in the statute. The statute clearly gives no authority to the Commission to permit one carrier to lease the property of another upon the application of a third.

In the case of *Hanlon* v. *Eshelman*, 169 Calif. 200; 146 Pac. 656; P. U. R. 1915-B, 842, we have a case in point. In that case the prohibition in the statute was against the sale (not the acquisition) of carrier property. In that case the principle was laid down that an application to sell must be made by the owner, the one who sells. We have abundant confirmation of the point we here make, that when the statute prohibits acquisition except with the approval of the Commission, the one who proposes to acquire must make application.

Section 51-A of the Public Utilities Act of California provided that:

> "No railroad corporation * * * or water corporation shall henceforth sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, or system, necessary or useful in the performance of its duties to the public * * * without having first secured from the Commission an order authorizing it so to do."

One Durfy owned a water system in the vicinity of Sherman, California. He contracted to sell it to one Hanlon. Hanlon filed a petition with the Public Utilities Commission of California, praying for an order authorizing the sale of the water system by Durfy and its purchase by him.

Before the Commission disposed of the proceeding Durfy filed a petition setting up his contract with Hanlon and also setting up that the City of Los Angeles desired to purchase his water works and alleging that it would be in the public interest if the sale to the city were authorized, and that the applicant would sell to Hanlon pursuant to his contract if the Commission should determine that it was in the public interest.

Later Durfy filed another petition alleging that he had executed a deed conveying a portion of his property to

Los Angeles and praying for an order approving said conveyance. The Commission dismissed the Hanlon application and authorized the conveyance to Los Angeles by Durfy.

Hanlon then sought a writ of mandamus to compel the Railroad Commission to authorize the sale by Durfy to himself. The court held that the Commission was without power to pass upon the Hanlon application since its power was only to approve applications made by the owner, the Commission having nothing to do with the rights of the purchaser. At page 844 of P. U. R. 1915-B, the court said:

> "The theory upon which the Commission declined to act in proceeding No. 941, by either granting or refusing permission to carry out the Hanlon contract, was that the action of the Commission, under Section 51a, is merely permissive, and that 'the application should be made by the owner of the public utility property, because the authority must run to such owner.' This view, we think, is the correct one. The Commission's power is to be exercised for the protection of the rights of the public interested in the service, and to that end alone. The sales, leases, or encumbrances affected by Section 51a are dispositions of property of a public utility 'necessary or useful in the performance of its duties to the public.' The owner may not transfer such properties unless authorized by the Commission. All that the Commission is concerned with, therefore, is whether a proposed transfer will be injurious to the rights of the public. If not, the owner may be authorized to make the transfer. With the rights of an intending purchaser the Commission has nothing to do."

Of course, the Central was a proper party to make the application for acquisition of control of the River Road by purchase of its stock. What we are here complaining of is the fact that application for authority to the River Road to acquire control of the Junction under a lease

was not made by either the Junction or the River Road. The Commission was without authority to make the order. This point was brought to the attention of the Commission at every stage of this case.

11. The Order of the Commission Is Not a Specific Finding that the Acquisition by the Central of the River Road and Junction Road Will Be in the Public Interest.

The Commission may authorize the acquisition by one carrier of the control of another, only when the Commission "is of opinion" that such acquisition of control "will be in the public interest." No one will question that the opinion of the Commission must be formed upon evidence of record in the proceeding before it, applying to the consideration of such evidence the experience and expert knowledge of the Commission as a trained tribunal. But we insist that whether or not the acquisition of control is in the public interest depends upon the control which will be exercised under the Commission's decision. The finding of the Commission must be specific. The control authorized is the only matter which the Commission can consider. It is not sufficient to say that if the control which is authorized be exercised subject to seventeen conditions the acquisition of control will be in the public interest. The language of the statute authorizes "acquisition to the extent indicated by the Commission." There is no limitation of the acquisition by the Commission in the present case, other than that the acquisition is in one case by the purchase of capital stock and in the other case by a lease for 99 years, renewable in perpetuity at the option of the lessee. Having thus defined the extent of the acquisition which it proposes to authorize, the Commission must then ask itself, and answer the question from the record, "will such acquisi-

tion 'be in the public interest'?" That question must be answered yes or no; it cannot be answered "yes, *if seventeen conditions are complied with.*" We submit that the finding made by the Commission does not comply with the statutory requirements.

As indicating that the Commission recognized it was dealing with a matter fraught with possible danger to the public interest, we call attention to the following excerpts from the opinion of the Commission:

> "There are grave objections to an unconditional approval of the plan under consideration." (Rec., 21.)
>
> "But we are not prepared, in any event, to authorize the consummation of the plan without making assurance doubly sure by the imposition of certain conditions." (Rec., 22.)

12. The Order of the Commission Is Void Because It Does Not Specify the Date Upon Which the Same Shall Become Effective.

Paragraph (2) of Section 15 of the Interstate Commerce Act, provides:

> "Except as otherwise provided in this act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, etc."

By reference to the terms of the order, set forth on pages 54 and 55 of the bill (Rec., 33), it will be observed that there is nowhere contained any specified period of time at the expiration of which, or any specific date upon which the order shall become effective. This failure to comply with the statute invalidates the order.

13. The Order Is Void Insofar As It Approves and Authorizes the Leasing of the Junction Properties, Owned and Leased, to the River Road, Because No Lease Executed By the Parties Has Been Submitted To and Been Approved By the Commission.

It has been the uniform practice, with the sole exception of Finance Docket 1165, to require the applicant to submit an executed lease to the Commission for approval by the Commission. This lease has not been filed with the Commission as required by law. Paragraph 2 of Section 5 is not complied with by the Commission's simple authorization to the parties to execute a lease without definite submission of its terms to the Commission.

In this connection, we refer to the opinion of the Commission in the *Central Pacific-Southern Pacific* case, *supra*, wherein the Commission said (page 510):

> "In this proceeding the Southern Pacific Company applies for authority under paragraph (2) of Section 5 of the Interstate Commerce Act to acquire control by lease and stock ownership of the Central Pacific Railway Company, *a copy of the proposed lease being filed with the application.*"

There the Commission gave consideration to authorizing the acquisition of control under the forms and provisions of the lease submitted with the application. In that way only can the Commission determine whether an acquisition by lease will be in the public interest. It is obvious that the terms of such a lease are of great importance and that whether or not such a lease will be in the public interest depends upon the provisions contained in the lease.

In this case the Commission attached to its order seventeen conditions; whether these conditions are made part of the lease is an important matter. Moreover, the provisions as to maintenance of the property and the

manner in which it is to be operated are likewise of great importance to the public. The practice which the Commission has followed in all other cases should have been followed in the instant case, and the lease *in haec verbis* should have been submitted to the parties and to the Commission before final approval was given by the Commission to the acquisition of control by the River Road of the properties of the Junction.

Failure to have the lease before it in executed form before it authorized the acquisition of control under the lease renders the order void. Moreover, under paragraph (5) of Section 6 of the Interstate Commerce Act, it is provided that "every common carrier subject to this act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party." Under paragraph 15 of Section X of the bill of complaint (Rec., 9-10) it is alleged that no lease of the railroad properties of the Junction to the River Road executed by the parties thereto has been submitted to or been approved by the Commission. On the motions to dismiss this allegation stands admitted.

CONCLUSION.

The various questions which are involved in the decision of this case are of great public importance. In the Transportation Act, 1920, Congress adopted a new policy of regulation of the common carriers of this country. The provisions of that act contained in Paragraphs (18) to (20) of Section 1 and in Section 5, are part of a well rounded plan of regulation, and should be so interpreted as to carry out the evident purpose of Congress. The order of the Commission complained of herein is at complete variance, as we see it, with this purpose of Congress.

For the reasons herein stated the decree of the District Court denying the application for temporary injunction and dismissing the bill should be reversed and the case remanded with directions to grant the prayer for relief contained in the bill.

Respectfully submitted,

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2003 Chicago Temple Bldg.,
Chicago, Illinois.

January 2, 1924.

Office Supreme Court, U.
FILED
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WM. R. STANSBU
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM

NO. 489

The Baltimore & Ohio Railroad Company, Chicago, Indianapolis & Louisville Railway Company, Chicago & Erie Railroad Company, Grand Trunk Western Railway Company, The Pennsylvania Railroad Company and The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company,
Appellants,

vs.

United States of America, The New York Central Railroad Company, The Chicago River and Indiana Railroad Company, The Chicago Junction Railway Company, The Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald,
Appellees.

Appeal from the District Court of the United States, for the Northern District of Illinois, Eastern Division.

BRIEF AND ARGUMENT ON BEHALF OF THE NEW YORK CENTRAL RAILROAD COMPANY AND THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY.

ROBERT J. CARY,
Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM.

THE BALTIMORE & OHIO RAILROAD COMPANY, CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY, CHICAGO & ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY AND THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, THE NEW YORK CENTRAL RAILROAD COMPANY, THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, THE CHICAGO JUNCTION RAILWAY COMPANY, THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY AND RICHARD FITZGERALD,

Appellees.

No. 489

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF AND ARGUMENT ON BEHALF OF THE NEW YORK CENTRAL RAILROAD COMPANY AND THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY.

Statement.

The statement of the case appearing in the brief for Appellants summarizes the proceedings had before

the Interstate Commerce Commission and in the Court below but fails to present in proper light the fundamental questions involved in the case. It is believed that one of the best arguments in answer to the brief for the Appellants will be to state the allegations of their bill and the questions presented by it in their true significance. For this purpose a re-statement is offered of the issue involved, of the procedure had in the Court below, and of the allegations of the bill.

For convenience the Appellants and Appellees will be called respectively, plaintiffs and defendants.

The Issue:

The bill of complaint filed in the above entitled cause, is averred to be brought pursuant to the provisions of C. 32 of the Urgent Deficiency Appropriations Act, approved October 22nd, 1913, (38 Stat. L., 219, 220), and seeks to set aside and annul a permissive order of the Interstate Commerce Commission (71 I. C. C. 631) entered May 16th, 1922, under paragraph (2) of Section 5 of the Interstate Commerce Act as amended, authorizing:

> (a) The New York Central Railroad Company to acquire control of the Chicago River and Indiana Railroad Company, a terminal switching property located in Chicago, by the purchase of all of its capital stock at a price not exceeding $750,000., and
>
> (b) The Chicago River and Indiana Railroad Company to acquire control of a second terminal switching railroad connecting with it, viz: the Chicago Junction Railway, by a ninety-nine year lease,

renewable in perpetuity at the option of the lessee.

The bill seeks also to set aside the transactions consummated upon the authority of the order almost a year before the bill was filed, viz: the purchase of the stock and the making of the lease.

For this purpose the parties to these transactions are made defendants with the United States.

The only contact stated to exist between the plaintiffs and the order of the Commission, as well as the transactions consummated upon its authority, is to be found in their allegation (amended Paragraph XII of the bill, Record, 53) that they are competitors of The New York Central Railroad Company in the Chicago territory and that the acquisition by it of control of the terminal properties referred to has given it the opportunity to develop *legitimately* (there is no charge in this respect of any unlawful act) competitive traffic in its own interest to the consequent loss of the same to the plaintiffs.

The chief ground, among other minor ones, of alleged invalidity in the order is that until the Commission, under the provisions of paragraphs (4) and (5) of Section 5 of the Interstate Commerce Act as amended shall adopt a final plan for consolidating the railway properties of the United States into a limited number of systems it has no power under paragraph (2) of the same section of the act to authorize one carrier to acquire control of another either by the purchase of its shares of stock or by the taking of a lease of its properties for the term authorized by the Commission (Record 7-8).

Paragraph (2) of Section 5 of the Interstate Commerce Act as amended by the Transportation Act, 1920, reads:

> "(2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

The Procedure in the Court Below.

The case was heard below before a court comprised pursuant to statute of a Circuit Judge and two District Judges upon motion of the plaintiffs for an interlocutory injunction and upon the several motions of the defendants to dismiss the bill. The motions of the respective parties were argued together. After hearing, the motion for an interlocutory injunction was denied (Record 143-144).

Thereupon the plaintiffs moved the court for leave to amend their bill instanter, which motion was granted. As

originally drawn the bill averred in substance, in paragraph XII that the acquisition of control approved and authorized by the Commission *will* result in diverting a large portion of competitive tonnage from the rails of the plaintiffs to the rails of the Central, or other routes in the New York Central System, and that such diversion, with consequent loss of revenue to the plaintiffs, *will* constitute irreparable loss and injury alleged to amount to a loss in net earnings of Ten Million Dollars per annum (Record 10).

The amendment made to the bill substituted a new first paragraph to paragraph XII averring in substance that the control of a belt line by a line-haul carrier gives such carrier a substantial advantage in securing competitive tonnage to the consequent disadvantage of competing line-haul carriers and describing how such advantage arises; that the New York Central control of the Junction properties authorized by the Commission has curtailed and will curtail the ability of the plaintiffs to secure competitive traffic of shippers located on the Junction properties; that the diversion of the competitive tonnage from the rails of the plaintiffs to the rails of the Central has resulted in a large loss of traffic and revenue to the plaintiffs amounting to Ten Million Dollars; and that the loss in net earnings to the plaintiffs from the continued control acquired under the order of the Commission will approximate Ten Million Dollars per annum (Record 53).

No charge is made that the Central has violated in the operation of the Junction properties any provision of the Interstate Commerce Act or has in any other respect

acted unlawfully as against the plaintiffs in promoting the movement of competitive traffic over its own lines.

All of the motions originally made were renewed with respect to the amended bill and, after further hearing upon the same, the court denied the plaintiffs' motion for an interlocutory injunction and granted the several motions of the defendants to dismiss the bill as amended, whereupon a decree was entered accordingly and the plaintiffs appealed therefrom to this court (Record 144).

Allegations of the Bill.

The facts disclosed on the face of the bill and its exhibits pertinent to the issues to be argued and their general significance may be summarized as follows (Record 1):

On December 28th, 1920, The New York Central Railroad Company filed its application with the Interstate Commerce Commission pursuant to the provisions of paragraphs (18) to (20), inclusive, of Section 1, and paragraph (2) of Section 5, of the Interstate Commerce Act, for authority and for a certificate of public convenience and necessity permitting the New York Central to enter into an agreement with The Chicago Junction Railways and Union Stock Yards Company providing for the acquisition by The New York Central Railroad Company of all of the capital stock of The Chicago River and Indiana Railroad Company, and for the leasing to such latter company for a term of ninety-nine (99) years and thereafter at the election of the lessee in perpetuity of the railroad properties (owned and leased) of The Chicago Junction Railway Company.

At the first hearing of the proceeding, held by the Commission at Chicago on April 5th, 1921, the plaintiffs in the bill in equity appeared and filed an intervening petition in opposition to the prayer of the application, which petition was received and the plaintiffs were made parties to the proceeding (Record 6).

After extensive public hearings, held at Chicago and Washington, the Commission, on May 16th, 1922, made its report (a copy of which is attached as an exhibit to the bill) (Record 15) summarizing the contentions of the respective parties; reviewing the record, which it stated was voluminous; finding the ultimate facts based upon the record; and finding, subject to the observance of certain specified conditions, that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction would be in the public interest. Pursuant to such finding, the Commission, on the same day, entered its order (a copy of which is also attached to the bill as an exhibit) (Record 33) providing:

> "That the acquisition by The New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock at a price not exceeding the sum of $750,000, be, and the same is hereby, approved and authorized."

and further providing:

> "That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized."

The plaintiffs allege, upon information and belief, that immediately upon the publication of the decision, report and order of the Commission, and prior to July 13th, 1922, the Central acquired control of the River Road by the purchase of the capital stock thereof; that the River Road acquired control of the Junction properties (owned and leased) by lease for the period of ninety-nine (99) years, renewable, at the option of the lessee, in perpetuity; and that the Central and River Roads have continually operated the said properties as an integral part of, and for the benefit of, the New York Central System of railroads (Record 10).

Almost a year after the consummation of the transactions thus authorized the plaintiff railroad companies filed their bill, as above stated, seeking to annul the order of the Commission and to set aside the transactions referred to.

The bill prays not only for a preliminary and a final injunction in respect of the subject matters above referred to, but also seeks a discovery of the relations existing between the defendant railroad companies, and, in furtherance thereof, asks that such defendants be required to answer a series of interrogatories contained in the bill (Record 11-14).

The jurisdiction for the bill is based by averment upon the provisions of the Urgent Deficiency Appropriations Act (Record 3), presumably upon the theory that the order of May 16th, 1922 of the Interstate Commerce Commission invades certain rights of the plaintiffs as parties in interest within the meaning of the language of that Statute. However, a survey of the bill, as a whole, makes it self-evident that it is brought for discovery and

injunctive relief against the defendants other than the United States with the object of setting aside the transactions mentioned and terminating the control of the Junction properties acquired by The New York Central Railroad Company.

The amended first paragraph of paragraph XII of the bill contains the only averments attempting to show contact between the order of the Commission, the transactions consummated pursuant to its authority, and the interests of the plaintiffs. It is the sole basis upon which they justify their right to proceed in equity to annul the order of the Commission and to set aside the transactions consummated pursuant to such order by the defendant railroad companies. It reads:

> "Plaintiffs further show that the River Road and the Junction, on May 15, 1922, were, and prior to that date always had been, neutral belt railroads uncontrolled by any trunk line carrier and as such were used by all railroads, entering Chicago, impartially and without discrimination; that prior to May 16, 1922, the plaintiffs herein competed for traffic originating at points of origin on, or destined to points of delivery on, the said River Road and the Junction on equal terms with the Central without either the plaintiffs or the Central having any advantage in the securing of said traffic by reason of having an ownership or control of the said River Road and/or the said Junction; that the acquisition of control approved and authorized by the Commission in its order of May 16, 1922, substitutes monopoly of control and operation for the neutral control and operation of the Junction and River Roads which prior to May 16, 1922, served alike all railroads reaching Chicago, including the

plaintiffs herein and the Central; that practically all of the tonnage originating at or destined to points on the Junction and the River Roads is competitive tonnage in that the same could be hauled either over the lines of railroad constituent parts of the New York Central System or over the lines of one or more of your plaintiffs; that the control of a belt line by one line-haul carrier gives that line-haul carrier substantial advantages in the securing of competitive tonnage to the consequent disadvantage of competing line-haul carriers not having such control; that in cases where the shippers on the River Road and the Junction have failed to direct the route of movement of their shipments consigned to points which are served by the Central or by lines of railroad constituent parts of the New York Central System, directly or through its or their connections, as well as by the plaintiffs herein, directly or by their connections, it is and since May 16, 1922 has been the practice of the officials, agents and employes of the River Road and Junction to route said shipments via the line of the Central and via the lines of carriers constituent parts of the New York Central System to the exclusion of routing any of said shipments via the lines of the plaintiffs herein; that the acquisition of control approved and authorized by the Commission in its said order has curtailed, and so long as it continues to exist, will, greatly curtail the ability of the plaintiffs to secure the competitive traffic of shippers located upon the lines of the Junction and the River Road for the reason that subsequent to May 16, 1922, it has been, now is, and will be, the practice of shippers located on the said railroads to give preference to cars of the Central (which, under the order complained of, has the control of the said Roads),

to the exclusion of cars of the plaintiffs, its competitors, and to route their shipments via the line of the Central and via the lines of railroad constituent parts of the New York Central System in lieu of routing said shipments via the lines of the plaintiffs herein; that the diversion of tonnage from the rails of the plaintiffs to the rails of the Central or other routes of the New York Central System, consequent upon the facts above related has resulted in a large loss of traffic and of revenue to the plaintiffs, to their irreparable loss and injury, in an amount exceeding $10,000,000.00; and that the loss in net earnings to plaintiffs which will result from the continued control acquired under the said order of the Commission will approximate $10,000,000.00 per annum so long as said control continues." (Record 53.)

It is to be noted that the foregoing allegations make no charge of any illegal discrimination or other unlawful act in the operation of the Junction properties under their new control as against the railroads of the plaintiffs, or that new operating practices or tariff provisions have been installed that now prevent them from serving all their connections with the same equality as theretofore.

The gravamen of the complaint is rather based upon an abstract proposition viz: "that the control of a belt line by one line-haul carrier gives that line-haul carrier substantial advantages in the securing of competitive tonnage to the consequent disadvantage of competing line-haul carriers not having such control"; that in the present case such advantage is evidenced by the fact that since May 16, 1922 it is the practice of the Junction officials to route unrouted shipments over the New York

Central and of shippers to give preference to the cars of the Central and to route their shipments via its lines in lieu of routing them via the lines of the plaintiffs.

The plaintiffs do not say that they have not now the same opportunity as existed prior to New York Central control to solicit business from shippers located on Junction rails and to cause it to move over their respective lines. They complain only that they have suffered loss of tonnage in a fair field of competition to a competitor because of an alleged tendency of the shipping public arising out of the control by such competitor of the Junction properties to voluntarily prefer its lines to those of their own.

Upon such a basis they have brought in a court of equity what is, in effect, a quo warranto proceeding to test the validity of the license granted by the Commission to the New York Central to acquire control of the Junction properties, for they aver that their bill of complaint is brought pursuant to the provisions of Chapter 32 of the Urgent Deficiency Appropriations Act to annul an order of the Commission, and they impliedly concede that if such license be valid they have suffered in the premises no injury of which they can complain, since all relief asked for is premised alone upon its alleged invalidity. Clearly they cannot be heard in any such capacity.

It would thus appear that the plaintiffs' own statement of their case should be one of the chief refutations of their right to proceed.

The plaintiffs assign certain reasons why the order of the Commission should be set aside and the transactions

consummated pursuant to the same should be declared void and enjoined. They are, in substance, as follows:

(1) The Commission was without authority either in law or in fact to make the said order (Record 6).

(2) The Commission issued no certificate of public convenience and necessity in favor of the transactions authorized by it (Record 6).

(3, 4 and 5) The record made before the Commission, upon which its order is based, contains no evidence that the present or future public convenience and necessity require or will require the consummation of the transactions proposed, but contains evidence that such consummation will be contrary to the present or future public convenience and necessity (Record 6-7). (The point here made is presumably based upon the assumption that the order of the Commission may have been entered pursuant to power given it under paragraphs (18) to (20) inclusive of Section 1 of the Interstate Commerce Act, which provides that the Commission shall evidence its action in the form of a certificate that the present or future public convenience and necessity require or will require the consummation of the transaction proposed by the applicant.)

(6 and 7) The record made before the Commission, upon which the said order is based, contains no evidence that the acquisition by the Central of control of the River Road by the purchase of the capital stock of the River Road or the acquisition by the River Road of the control of the properties of the Junction under a lease will be in the public interest; but on the contrary, the said record contains evidence which clearly shows that the said ac-

quisition of control will be directly contrary to the public interest and to a sound public policy (Record 7). (The point here made is based upon the assumption that the order of the Commission was entered pursuant to power given it under paragraph (2) of Section 5 of the Interstate Commerce Act.)

The finding of the Commission contained in its report follows the requirements of said paragraph. It reads:

> "Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest."

The formal order of the Commission based upon its report, and heretofore quoted, likewise complies with the requirements of said paragraph, for it orders:

> "That the acquisition by the New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock * * * be, and the same is hereby, approved and authorized."

and

> "That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized."

(8, 9 and 10) The Commission, by paragraph (2) of Section 5 of the Interstate Commerce Act, is authorized to approve the acquisition by one of such carriers of

control of another carrier, either under a lease or by the purchase of stock, only when such control does not involve the consolidation of such carriers into a single system for ownership and operation, and when such control will be in the public interest; acquisition by the Central of the control of the River Road by the purchase of the capital stock of said River Road and acquisition by the River Road of control of the Junction by lease of its properties, as set forth in the application of the Central to the Commission and authorized by the Commission, will constitute a consolidation of (1) the Central, (2) the River Road, and (3) the Junction, into a single system for ownership and operation, and, therefore, the Commission is without authority by order to approve and authorize such acquisition (Record 7-8). (The claim made under this point is based upon the contention, as further elaborated in the bill, that the Commission has not yet, as required by paragraphs (4) and (5) of Section 5 of the Interstate Commerce Act, adopted a plan for the consolidation of the railway properties of the continental United States into a limited number of systems, and that until such plan has been adopted the Commission has no power to authorize, under the provisions of paragraph (2) of Section 5 of the Act, one carrier to acquire control of another carrier by the purchase of all of its capital stock and thereupon to arrange that such controlled carrier shall take a lease for ninety-nine (99) years and thereafter, at the election of the lessee, in perpetuity of the railroad properties of a third carrier. It is claimed that the consummation in the instant case of control of such a character amounts to a consolidation of (1) the River Road and of (2) the Junction, and also of (1) the

Central, of (2) the River Road, and of (3) the Junction, within the meaning of paragraph (6) of Section 5 of the Interstate Commerce Act, making it lawful for two or more carriers by railroad subject to said Act, to consolidate their properties, or any part thereof, into one corporation for the ownership, management and operation of the properties theretofore in separate ownership, management and operation, under certain conditions, the first of which is that "The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the Commission".)

(11) The order of the Commission is void because entered pursuant to the application of the Central alone, and, insofar as it purports to approve and to authorize the acquisition by the River Road of the control of the property of the Junction under a lease, it is unlawful and void, because no application was made to the Commission by either the River Road or the Junction seeking the approval and authorization of such acquisition (Record 9).

(12) Exception is taken to the fact, as being a want of compliance with paragraph (2) of Section 5, that the Commission prefaced its finding that the acquisition of control approved by it will be in the public interest with the words "Subject to the observance of the above conditions" being certain conditions enumerated in its report (Record 9).

(13) It is averred that the order is null and void because it did not prescribe the day upon which the same should take effect, being contrary to the requirement of paragraph (2) of Section 15 of the Interstate Com-

merce Act that "all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, etc." (Record 9).

(14) The order is unlawful and void insofar as it purports to approve and authorize the leasing of the properties (owned and leased) of the Junction to the River Road, in that no application has been made to the Commission by either the River Road or the Junction for a certificate that the present or future public convenience and necessity require, or will require, the acquisition and operation by the River Road of the properties operated by the Junction on May 16th, 1922 (Record 9). (The point here made is presumably based upon the assumption that the order of the Commission may have been entered pursuant to power given it under paragraphs (18) to (20) inclusive of Section 1 of the Interstate Commerce Act.)

(15) The order of the Commission insofar as it purports to approve and to authorize the leasing of the properties (owned and leased) of the Junction to the River Road is unlawful and void in that no lease of the railroad properties (owned and leased) of the Junction to the River Road executed by the parties thereto has been submitted to, or been approved by, the Commission (Record 9).

The bill of complaint with its attached exhibits, which are made a part of it as fully as if set forth in the bill, shows that the order of the Commission was permissive in character, sanctioning the exercise of a privilege

granted by Statute upon approval and authority of the Commission after hearing; that extensive public hearings were had at which the plaintiffs, as interveners, were present; that a voluminous record was taken upon all issues involved (Record 16); that in the Commission's report it summarized the several contentions of the respective parties and the evidence pertinent to the issues; that, upon the facts so reported, it held that pending final determination of future policies the greatest good can be obtained by the continuance, for the time being, of the competitive terminal situation; that this can best be accomplished by bringing the present neutral Junction properties into closer relation with a trunk line like the Central; that the Central's terminal facilities are relatively inadequate as compared with the competitor eastern trunk lines, but that the Central controls extensive facilities for classification and interchange which are complementary to the Junction properties; that the stronger competition and the connection between the Junction properties and the Harbor Belt facilities, which would thus be brought about, would not only insure to the shippers of the Junction the necessary expansion and elasticity of facilities, together with the assistance of an interested trunk line in times of car shortage, and other emergencies, but would also remove congestion from the closely hemmed-in district served by the Junction and thus open facilities for expedition in the handling of traffic in and out, and also for handling traffic from one part of the City to another; that it has been held that where such a transaction as the one proposed would clearly facilitate the movement of traffic through a highly congested district, the circumstances that other carriers would suffer a loss of revenue is not

controlling, citing (*People ex rel. New York Central R. R. Co.* v. *Public Service Commission,* 183 N. Y. S. 930); that there are in the record ample grounds for the belief that the Junction can no longer solve its problems without outside assistance; that on the other hand, it is believed that the benefits pointed out by the Central can be made to accrue to the public by the consummation of the proposed plan; that a prime factor in the situation is the circumstance that the general policy on all terminals in Chicago is that of equal opportunity afforded to all connecting carriers irrespective of the ownership or control of a given terminal property by a single trunk line, or by a group of trunk lines; that traffic is handled for all carriers in the same way and on the same terms, so that a shipper on terminals owned by a single carrier has the utmost freedom in routing via competing lines and apparently receives the same measure of service whether his shipment moves over the lines of the owning carrier or those of a competitor (Record 16-22).

The report then continues by saying:

> "Those shippers who appeared in opposition express the fear that they will not be accorded like treatment by the Central. The present management of the Central disclaimed any intention of making any changes in the method of handling competitive traffic or the general plan of operating the Junction properties, and those assurances may be taken at their face value, especially since the contrary policy would clearly be against the self-interest of the Central, in that it would thereby lose the good will of the shipper. There is of course, every indication that the Central will be able to build up its own line-haul traffic as the re-

> sult of its connection with the management of the Junction, and it by no means follows that harm to the public may result from legitimate effort and initiative to that end." (Record 22.)

It thereupon specifies a series of conditions to be observed in the operation of the properties subject to its order of approval and concludes by finding that, subject to the observance of such conditions, the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest (Record 22-25).

It thus appears from the bill of complaint that the Commission gave due consideration, from the standpoint of the public interest, to the ground, and only ground upon which the plaintiffs seek to secure in their behalf the intervention of a court of equity, namely, that by virtue of the acquisition of control of the Junction properties by the New York Central a new competitive factor has been interjected into a situation whereby they allege that they have been and will be subjected to a loss of competitive tonnage.

No claim is made that the order of the Commission was addressed to the plaintiffs or attempted to regulate their affairs in any respect; no charge is made that their property will be taken without due process of law or that they will be deprived of the equal protection of the law; no charge is asserted that the acquisition of control by the Central of the Junction properties will be used unfairly or contrary to law. Its existence as a fact is the sole thing complained of and the only premise upon which is based every prayer for equitable relief.

POINTS AND AUTHORITIES

I.

The Plaintiffs have misconceived the application of the provisions of the Urgent Deficiency Appropriations Act. It created no statutory right of review, either as to parties or issues, of the Commission's orders. Except as it restores to the Distict Courts certain equity jurisdiction it is solely a statute of procedure. The order of May 16th, 1922 was a legislative act in the form of a sanction to exercise a privilege granted pursuant to statute. The Plaintiffs are not subject to, or affected by its terms and cannot complain of its alleged invalidity.

Borgnis v. *Falk Co.*, 147 Wis. 327; 133 N. W. 209.
Prentis v. *Atlantic Coast Line Company*, 211 U. S. 210, 226.

1. THE TRANSFER OF THE EXCLUSIVE JURISDICTION OF THE COMMERCE COURT TO THE DISTRICT COURTS HAD THE EFFECT ONLY OF RESTORING TO SUCH COURTS, AS SUCCESSORS TO THE CIRCUIT COURTS, THE ORIGINAL POWERS AT LAW AND EQUITY OF THE CIRCUIT COURTS.

Urgent Deficiency Appropriations Act, October 22, 1913, 38 Stat. L. 219, 220.
The Commerce Court Act, 36 State. L. 539.
Peavey & Company v. *Union Pacific R. Co.*, 176 Fed. Rep. 409.
Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42.

2. THE ORDER OF MAY 16TH, 1922, OF THE INTERSTATE COMMERCE COMMISSION, BEING A PERMISSIVE ONE OF AUTHORITY AND APPROVAL, IT IS FROM ITS NATURE INCAPABLE OF BEING ENFORCED, AND IS THEREFORE NOT AN ORDER SUBJECT TO ANNULMENT BY A COURT OF EQUITY.

Procter & Gamble v. *United States*, 225 U. S. 282.

3. THE ORDER OF MAY 16, 1922, DID NOT AFFECT THE RIGHTS OR INTERESTS OF THE PLAINTIFFS IN ANY RESPECT.

United States v. *B. & O. R. R. Company*, 225 U. S. 306.

I. C. C. v. *Union Pacific*, 222 U. S. 541.

I. C. C. v. *Illinois Central*, 215 U. S. 452.

Reagan v. *Farmers' Loan & Trust Company*, 154 U. S. 362.

Borgnis v. *Falk Co.*, 147 Wis. 327, 133 N. W. 209.

4. THE PLAINTIFFS ARE NOT PARTIES IN INTEREST WITHIN THE MEANING OF THE PROVISOS CONTAINED IN SECTION 5 OF THE COMMERCE COURT ACT.

Commerce Court Act, Section 5.

Edward Hines, Yellow Pine Trustees, et al. v. *United States*, No. 91. (Decided by U. S. Supreme Court Nov. 12th, 1923.)

Peavey & Co. v. *Union Pacific R. Co.*, 176 Fed. Rep. 409.

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42.

McLean Lumber Company v. *United States*, 237 Fed. Rep. 460.

Nashville Grain Exchange v. *United States* (*case 46*), 191 Federal Reporter 37.

Louisville & Nashville Railroad Company (*case 47*), 191 Federal Reporter 37.

Atlantic Coast Line R. Co. v. *Interstate Commerce Commission*, 194 Federal Reporter 449.

Merchants' & Manufacturers' Traffic Association v. *United States*, 231 Fed. Rep. 292.

United States v. *Merchants' etc. Association*, 242 U. S. 178.

City of New York v. *United States*, 272 Fed. Rep. 768.

Village of Hubbard, Ohio v. *United States*, 278 Fed. Rep. 754.

State of Tennessee v. *United States*, 284 Fed. Rep. 371.

North Dakota v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485.

Oklahoma v. *A., T. & Santa Fe Ry.*, 220 U. S. 277.

North Dakota v. *Chicago & N. W. Ry. Co.*, 257 U. S., 485.

McLean Lumber Company v. *United States*, 237 Fed. Rep. 460.

5. THE PLAINTIFFS ARE NOT PARTIES IN INTEREST UNDER THE PROVISIONS OF THE INTERSTATE COMMERCE ACT.

United States et al. v. *Illinois Central R.R. Co. et al.*, Nos. 40 and 38. (Decided by the Supreme Court of the United States, January 7th, 1924.)

6. THE PLAINTIFFS ARE NOT PARTIES IN INTEREST AS DEFINED BY PRINCIPLES OF EQUITY.

Railroad Company v. *Ellerman*, 105 U. S. 166.

Geneva-Seneca Electric Co. v. *Economic Power & Construction Co. and City of Geneva*, 136 App. Div. (N. Y.) 219.

The Christopher & Tenth St. Ry. Co. v. *The Central Crosstown R. R. Co.*, 67 Barb. (N. Y.) 315.

New England R. Co. v. *Central Ry. & Elec. Co. et al.*, 36 Atl. 1061.

L. R. A. 1916 B, page 1087.

Baxter Tel. Co. v. *Cherokee Co. Mut Tel. Assn. et al.*, 94 Kan. 159, 146 Pac. 324.

Coffeyville Mining & Gas Co. v. *Citizens' Natural Gas & Mining Co.*, 55 Kan. 173-179, 40 Pac. 326.

Burns v. *St. Paul City Ry. Co.*, 101 Minn. 363, 112 N. W. 412.

Camblos v. *Phila. &c. R. Co.*, Federal Case No. 2331.

The Golconda Nor. Ry. v. *The Gulf Lines C. R. R. of Ill.*, 265 Ill. 194.

New Hartford Water Co. v. *Village Water Co.*, 87 Atl. 358.

Home Tel. Co. of Grass Lake v. *Michigan R. R. Comm.*, 140 N. W. 496.

II.

The provisions of the Commerce Court Act as applied to the district courts could not constitutionally authorize such courts to review orders of the Interstate Commerce Commission except as may be so required to pronounce judgment in cases and controversies as provided in the Constitution.

Muskrat v. *United States*, 219 U. S. 346.

Marbury v. *Madison*, 1 Cranch. 137.

Cohens v. *Virginia*, 6 Wheat. 264.

Chicago & Grand Trunk Railway Company v. *Wellman*, 143 U. S. 339.

Keller, et al., v. *Potomac Electric Power Company et al.*, 261 U. S. 428.

III.

The allegation of the bill that the record made before the Commission upon which the said order is based contains no evidence that the present or future public convenience and necessity require or will require the consummation of the transactions authorized or that they will be in the public interest, are not sufficient to show that the Commission was without power to enter said order, or that it was otherwise invalid.

Interstate Commerce Act, Paragraph (2) of Section 5.
Interstate Commerce Commission v. *L. & N. Railroad*, 227 U. S. 88.
United States v. *Merchants and Manufacturers Traffic Association*, 242 U. S. 178.
Merchants & Manufacturers Traffic Association v. *United States*, 231 Fed. Rep. 292.

IV.

The order of the Commission being a legislative act, permissive in character, its validity cannot be attacked upon the ground that it is not supported by evidence.

United States v. *Merchants and Manufacturers Traffic Association*, 242 U. S. 178.
I. C. C. v. *L. & N. R. R.*, 227 U. S. 88.
Interstate Commerce Act, Section 20a.
Miller v. *United States*, 277 Fed. Rep. 98.

V.

The purchase by The New York Central Railroad Company of all of the capital stock of The Chicago River and Indiana Railroad Company and the leasing to such latter company of the railroad of The Chicago Junction Railway Company did not bring about a consolidation of either The New York Central Railroad Company and The Chicago River and Indiana Railroad Company, or of The Chicago River and Indiana Railroad Company and The Chicago Junction Railway Company, or of all three such railroad companies into a single system for ownership and operation. The Interstate Commerce Commission therefore had power under the provisions of paragraph (2) of Section 5 of the Interstate Commerce Act to approve and authorize the acquisition of control by The New York Central Railroad Company of said other railroads by the means thus described.

1. Interpretation of paragraph (2) of Section 5.

2. Interpretation of the Term Consolidation as used in Paragraphs (4), (5), (6) and (7) of Section 5.

Interstate Commerce Act, Paragraphs (4), (5), (6) and (7) of Section 5.

Thompson on Corporations, Second Edition, Volume 5, Sections 6035, 6036, 6037, 6040.

14-A *Corpus Juris*, 1054.

Fletcher, Cyclopedia Corporations, Vol. 7, Sec. 4661.

Louisville, &c. Railroad Co. v. *Louisville Trust Co.*, 174 U. S. 552.

Mills v. *Central Railroad Company*, 2 Atl. (N. J.) 453.

Archer v. *Terre Haute, etc. R. Co.*, 102 Ill. 493.

State v. *Montana Ry.*, 45 L. R. A. 271; 53 Pac. 623.

Gere v. *New York Central & Hudson River Railroad Company*, 19 Abb. N. C. 193.

3. Inconsistencies between Paragraph (2) of Section 5 and the remaining Paragraphs of the Section arising from interpretation given to Paragraph (2) by Counsel for the Plaintiffs.

United States v. *Southern Pacific Co., et al.*, 290 Federal Reporter 443; 259 U. S. 214.

La Roque v. *United States*, 239 U. S. 64.

Rose's Notes (*United States* v. *Moore*, 95 U. S. 760).

Lease of Valley Terminal Railway Co., Finance Docket No. 1, 65 I. C. C. 105.

Control of Big Four by New York Central, Finance Docket No. 2046, 72 I. C. C., 96, 98.

Valley Terminal Railway Company, 65 I. C. C., 105, 76 I. C. C., 147.

Chicago, Terre Haute & S. E. R. R. Co., 70 I. C. C., 20.

New York, Philadelphia & Norfolk R. R. Co., 70 I. C. C., 299.

Cumberland Valley & Martinsburg R. R., 70 I. C. C., 301.

Perth Amboy & Woodridge R. R. Co., 70 I. C. C., 303.

New York Bay Railroad Company, 70 I. C. C., 306.

California Southern R. R. Co., 70 I. C. C., 514.
Chesapeake & Ohio Railway Co. of Indiana, 70 I. C. C., 694.
Arizona & New Mexico Ry. Co., 70 I. C. C., 795.
Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co. (Panhandle), 72 I. C. C., 128.
Eldorado & Santa Fe Ry. Co., 72 I. C. C., 229.
Toledo & Ohio Central Ry. Co.
Kanawha & West Virginia R. R. Co.
Zanesville & Western Ry. Co.
} 72 I. C. C., 243.
Grand Rapids & Indiana Ry. Co., 72 I. C. C., 260.
Virginian & Western Ry. Co., 72 I. C. C., 454.
Wheeling Terminal Ry. Co. and others, 72 I. C. C., 674.
Chicago, Memphis & Gulf Ry. Co., 76 I. C. C., 637.
Chicago, St. Louis & New Orleans Ry., 76 I. C. C., 294.
New York, Lake Erie & Western C. & R. R. Co., 71 I. C. C., 541.
Rio Grande, El Paso & Santa Fe R. R., Finance Docket 2804, decided April 4, 1923.
Control of Black Mountain R. R., Finance Docket 2852, decided May 5, 1923.
Control of Dodge City & Cimarron Valley Ry., Finance Docket 2870, decided May 16, 1923.
Evansville, Indianapolis & Terre Haute Ry. Co., 67 I. C. C., 513.
Pittsburgh, Fort Wayne & Chicago Ry. Co., 67 I. C. C., 752.
Control of Lake Erie & Western by Nickel Plate, 72 I. C. C., 459.

VI.

The Plaintiffs' right to equitable relief is barred because of their laches shown on the face of their bill.

Commonwealth v. *Phila., B. & B. M. Tpk. Co.*, 153 Pennsylvania 47 (25 Atl. Rep. 1105).
State v. *Janesville Water Power Co.*, 92 Wisconsin 496 (66 N. W. 512).
United States v. *Willamette V. & C. M. W. R. Co.*, 54 Fed. Rep. 807.
People v. *Pullman Palace Car Co.*, 175 Illinois 125.
Sullivan v. *Portland etc. R. R. Co.*, 94 U. S. 806.
Galliher v. *Cadwell*, 145 U. S. 368.
New York City v. *Pine*, 185 U. S. 93.
Venner v. *Chicago City Railway Co.*, 236 Illinois 349.
Marks v. *Merrill Paper Co.*, 203 Fed. Rep. 16.
Wright v. *Tacoma Gas & Elec. Light Co.*, 101 Pacific 865.
Hill v. *Atlantic & N. C. R. R. Co.*, 145 N. C. 539 (55 S. E. 854).
U. S. Trust Co. v. *Chicago Terminal Transfer R. Co.*, 188 Fed. Rep. 292.

WHERE LACHES OF THE PLAINTIFFS IS SHOWN ON THE FACE OF THE BILL IT MAY BE TAKEN ADVANTAGE OF BY DEMURRER OR BY ITS EQUIVALENT, A MOTION TO DISMISS THE BILL.

Maxwell v. *Kennedy*, 8 Howard 210.
Speidel v. *Henrici*, 120 U. S. 377.
Venner v. *Chicago City Railway Co.*, 236 Illinois 349.

VII.

None of the objections made in the bill to the validity of the Commission's order based upon an alleged want of regularity in procedure is well taken. Such objections are all frivolous in character.

Interstate Commerce Act, Paragraph (19) of Section 1.

Interstate Commerce Act, Paragraph (2) of Section 5.

United States v. *Merchants' etc. Associations*, 242 U. S. 178.

BRIEF OF ARGUMENT.

I.

The Plaintiffs have misconceived the application of the provisions of the Urgent Deficiency Appropriations Act. It created no statutory right of review, either as to parties or issues, of the Commission's orders. Except as it restores to the District Courts certain equity jurisdiction it is solely a statute of procedure. The order of May 16th, 1922 was a legislative act in the form of a sanction to exercise a privilege granted pursuant to statute. The Plaintiffs are not subject to, or affected by its terms and cannot complain of its alleged invalidity.

There are certain underlying principles which should be noted in considering the issues involved in this case:

(a) The Interstate Commerce Commission is an arm of the legislative branch of the Government. An excellent statement of this universally recognized principle is found in the case of *Borgnis* v. *Falk Co.*, 147 Wis. 327; 133 N. W. 209. The court speaking of commissions created by the legislature there said at page 219 of 133 N. W.:

> "The legislative branch of the government by statute determines the rights, duties and liabilities of persons and corporations under certain conditions of fact, and varying as the facts and conditions change. Manifestly the legislature cannot remain in session and pass a new act upon every change of conditions; but it may and does commit to an administrative board the duty of ascertain-

> ing when the facts exist which call into activity certain provisions of the law, and when conditions have changed so as to call into activity other provisions. The law is made by the Legislature; the facts upon which its operation is dependent are ascertained by the administrative board."

(b) The order of the Commission in the present case was legislative in character because its effect was to apply prospectively a federal statute.

In *Prentis* vs. *Atlantic Coast Line Company*, 211 U. S. 210, 226, this court said:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind".

(c) There is no statute vesting in the Federal Courts a right to review the proceedings or orders of the Interstate Commerce Commission.

(d) Legislation in this respect is limited to prescribing the occasions and procedure under which the Federal Courts may exercise the powers otherwise inhering in them as courts of law and equity to enforce or annul the orders of the Commission as an administrative body.

1. THE TRANSFER OF THE EXCLUSIVE JURISDICTION OF THE COMMERCE COURT TO THE DISTRICT COURTS HAD THE EFFECT ONLY OF RESTORING TO SUCH COURTS, AS SUCCESSORS TO THE CIRCUIT COURTS, THE ORIGINAL POWERS AT LAW AND EQUITY OF THE CIRCUIT COURTS.

The Urgent Deficiency Appropriations Act of October 22nd, 1913 (38 Stat. L., 219-220) abolished the Commerce Court from and after December 31st, 1913, and provided that "the jurisdiction vested in said Commerce Court by said Act [Commerce Court Act] is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed.".

The Urgent Deficiency Appropriations Act further provides that "The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court.".

Section One of the Commerce Court Act (36 Stat. L. 539) reads in part as follows:

> "Section 1. That a court of the United States is hereby created which shall be known as the Commerce Court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:
>
> First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce

Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

* * * * * * *

Nothing contained in this Act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court."

Particular attention is called to the last paragraph above quoted.

Interpretative of the powers of the Federal Courts, as regulated by statute, over the orders of the Commission is the case of *Peavey & Company* v. *Union Pacific R. Co.*, 176 Fed. Rep. 409. In this case it is said:

> "A careful search of the interestate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the commission to those who were parties to the proceeding before it upon which the order was based. The proceeding in the court is not an appeal; it is a plenary suit in equity. 'The jurisdiction to hear and determine such suits' is vested in the Circuit Courts. Section 16, as amended (34 Stat. 592 (U. S. Comp. St. Supp. 1909, p. 1162)). The determination of the question what parties may maintain such suits is left by the interstate commerce act to the general rules and practice in equity, and under them any party whose rights of property are in danger of irreparable injury from an unauthorized order of the commission may appeal to a federal court of equity for relief."

This case was appealed to this Court under the title of the *Interstate Commerce Commission* vs. *Diffenbaugh*, 222 U. S. 42. The Court said:

> "The jurisdiction in the Diffenbaugh case was doubted, although the Commission did not press the point as it wishes a final decision. We are content to leave that matter on the statement of the court below. 176 Fed. Rep. 416, 417. The plaintiffs are affected by the order and it is just that they should have a chance to be heard, although not parties before the Commission."

In creating the Commerce Court and transferring to it specified instances of jurisdiction of the Circuit Courts, Congress also provided that

> "The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this act shall not affect the jurisdiction now possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes." (Sec. 1.)

Thus the effect of transferring by means of the Urgent Deficiency Appropriations Act the exclusive jurisdiction previously given to the Commerce Court to the District Courts has now resulted in delivering to the District Courts that jurisdiction formerly possessed by the Circuit Courts before the enactment of the Commerce Court Act, with the effect only that in the instance of the cases enumerated in the Commerce Court Act the procedure of the Commerce Court Act, to which the District Courts were made subject, is to be followed.

In the present situation then, we are, from the jurisdictional standpoint, as if Section One of the Commerce

Court Act had never been enacted and proceeding in the United States District Court under its ordinary equity powers.

The provisions of the Urgent Deficiency Appropriations Act neither added to nor took from such powers, but only prescribed the procedure under which they should be exercised on certain occasions.

It is true, therefore, that this proceeding is not in the nature of a statutory reviewing action either as to parties or issues to pass upon the legality of the order of May 16th, 1922, of the Interstate Commerce Commission, or of the validity of the transactions undertaken pursuant to authority thus given. The jurisdiction of the court over the controversies involved is to be decided by submitting such controversies to the application of the ordinary principles of equity jurisdiction, and as thus analyzed to determine whether as to parties or questions they present issues that a court of equity unaided by special statutory powers should consider, and if so, that Federal courts of equity have power to adjudicate.

2. THE ORDER OF MAY 16TH, 1922, OF THE INTERSTATE COMMERCE COMMISSION, BEING A PERMISSIVE ONE OF AUTHORITY AND APPROVAL, IT IS FROM ITS NATURE INCAPABLE OF BEING ENFORCED, AND IS THEREFORE NOT AN ORDER SUBJECT TO ANNULMENT BY A COURT OF EQUITY.

The District Courts having acquired, as successors of the Commerce Court, no special statutory jurisdiction, respecting orders of the Interstate Commerce Commission, it is appropriate to consider whether it is within

the jurisdiction of a Federal Court of Equity to inquire into the validity of an order of the Interstate Commerce Commission having no mandatory effect, and thus subjecting no one to the observance of its provisions.

This comes to the inquiry whether the judicial branch of the Government can interfere in the activities of the legislative or executive branches of the Government in the absence of a showing that a private right protected either by the Constitution or by law has been invaded.

This Court has passed squarely upon this proposition in the case of *Procter & Gamble* v. *United States*, 225 U. S. 282. The issue involved in this case was whether the Commerce Court had power to compel the Interstate Commerce Commission to enter an order granting relief to the Procter & Gamble Company as a petitioner to the Commission in which it objected to certain regulations concerning demurrage.

The Commission in declining to act upon the petition made a report declaring that the rules complained of were in no sense contrary to the act to regulate commerce, and on the contrary conformed to that act and tended to prevent and repress unlawful preferences and discriminations.

The issue thus raised was whether the courts had power to inquire into the validity of an order of the Commission of a negative character in the sense that the order so made did not seek to compel action on the part of others; that is, have the courts power to control the Commission's action where it declines relief, leaving the parties to the proceeding as they were? Again, of course, to such negative action of the Commission would be a permissive order, as in the instant case, in which the

parties to the same are authorized to act as volunteers.

The United States and the Interstate Commerce Commission appearing for the purpose, challenged the jurisdiction of the court to entertain the cause, and moved to dismiss the same—

> "'Because the order of the Interstate Commerce Commission complained of *directed no affirmative relief* and the negative order of the Commission dismissing the complaint affords no ground for an action in this court;' and upon the following more detailed specifications filed on behalf of the United States:
>
> '(a) It prays that the order of the Interstate Commerce Commission be enjoined, when said order *directed no action against any party and therefore the same is not subject either to enforcement or to injunction.*' * * *" (italics ours).

The reasons for dismissal above assigned apply accurately to the form of order in the instant case. The court speaking through Mr. Chief Justice White in sustaining the motion to dismiss the bill held that the words of the second subdivision of the Commerce Court Act, referring to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission, "confer jurisdiction only to entertain complaints as to affirmative orders of the Commission; that is, they give the court the right to take cognizance when properly made of complaints concerning the legality of orders, rendered by the Commission and confer power *to relieve parties in whole or in part from the duty of obedience* to orders which are found to be illegal."

An action to relieve a party from the duty of obedience to an order necessarily means that such order must be mandatory in respect of such party or his affairs.

Considering the first subdivision of the act relating to the enforcement of the Commission's orders in connection with the second, above referred to, the court said:

> "In other words, by the cooperation of the two paragraphs, authority is given on the one hand, to enforce compliance with the orders of the Commission if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order."

There does not inhere in an order of the Commission reading that a specific act is "approved and authorized" the question of enforcement, for all parties come to such an occasion as volunteers.

It is obvious under the principle announced in the Procter & Gamble case that if the Commission had refused to approve and authorize the purchase by the New York Central of the River Road stock, and the leasing of the Junction properties to the River Road, the New York Central could not have invoked the jurisdiction of the courts to compel the Commission to take action in the premises.

On the other hand, the Commission, having entered a permissive order of approval and authorization, it is likewise obvious that no stockholder of the New York Central could invoke the courts to set such order aside as being unwarranted in law, since the parties to whom it is addressed come to its terms as volunteers. True

if such stockholder could show injury to his own interests it might possibly be argued that he could file a stockholder's suit to enjoin his corporation from committing an *ultra vires* act (assuming that for a corporation to act upon authority alleged to be erroneously given by the Commission under paragraph (2) of Section 5 of the Act could be so regarded), but such a proceeding would in no wise involve the Commission or the United States as necessary or proper parties, since no relief in such case could be asked against the Commission. The concomitant of annulment of the Commission's order is injunctive relief against its enforcement, but the Commission has required nothing of the parties to which its permissive order is addressed, and it certainly cannot be called into court to defend its action in respect of a subject matter with which it can have no privity of relationship, namely, the alleged *ultra vires* acts of the corporation. Such a case would, therefore, come to the district court as an ordinary stockholder's proceeding in equity, and would not have been within the jurisdiction of the Commerce Court, and is consequently not within the jurisdiction of the District Court under the provisions of the Urgent Deficiency Appropriations Act. The plaintiffs, however, are much farther removed than a stockholder from bringing the Commission in the name of the United States into court, for they are strangers to the defendant railroad companies and cannot complain of their alleged usurpation of powers. Nor is it an answer to this to say that the defendant railroad companies as opportunists in their position because of the order of the Commission can commit wrongs against the plaintiffs, for if they did so their acts would have no

identity with the order of the Commission. Finally it should be added that it is impossible to discover in the bill any charge that the acts of the defendant railroad companies are *ultra vires* except by inference, or whatever their nature that they have caused the plaintiffs any legal injury.

In the Procter & Gamble case Mr. Chief Justice White said:

> "Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452."

The above quoted language, as the authorities universally show, is to be read in its relation to controversies involving the question of taking through the enforcement of the Commission's order the plaintiff's property without due process of law or interfering with his rights in some other form protected by law.

3. THE ORDER OF MAY 16, 1922 DID NOT AFFECT THE RIGHTS OR INTERESTS OF THE PLAINTIFFS IN ANY RESPECT.

This Court has specified many times the several purposes for which the Federal courts may re-examine the findings and orders of the Interstate Commerce Commission. One of its concise statements in this respect is found in the case of *United States* v. *B. & O. R. R. Company*, 225 U. S. 306. In this case the court said:

> "We have determined in the *Procter & Gamble Case, ante* p. 282 that the Commerce Court was but endowed in considering whether an affirmative order of the Commission should be *enforced* on the one hand or set aside and declared *non-enforcible* on the other with the jurisdiction and power existing at the time that act was passed in the Circuit Courts of the United States. And as, at that time, it was conclusively settled that the courts had only authority to re-examine the findings of the Commission as to subjects like the one here under consideration, for the purpose of ascertaining whether the action of the Commission was repugnant to the Constitution, in excess of the statutory powers conferred upon it, or manifested such an abuse as to be equivalent to an excess of authority, it clearly results that the court below was likewise limited in passing upon the petition before it in this case. This being true, it is also necessarily true that virtually the sole authority of the court below was in a sense confined to determining questions of law arising upon the case as presented on the face of the pleadings."

See also *I. C. C.* v. *Union Pacific,* 222 U. S. 541, and *I. C. C.* v. *Illinois Central,* 215 U. S. 452 at page 70.

Since the District Court as successor of the Commerce Court is given no statutory powers to review the orders of the Commission, its jurisdiction can be invoked in the above instances mentioned by the court only to prevent an unlawful invasion of a private right. Whatever be the nature of the question coming before the court, with respect to the activities of the Commission, in the last analysis it can have no other duty than this.

In *Reagan* v. *Farmers' Loan & Trust Company,* 154 U. S. 362, Mr. Justice Brewer, in discussing the province of the Federal Courts with respect to orders of the Commission prescribing rates, makes the principle stated very clear. He says:

> "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function." * * *
>
> "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation." * * *

> "These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection *which is the constitutional right* of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property." * * *

In the instance of an order of the Commission granting to a volunteer the right to exercise a franchise there cannot inhere in the situation an act of government which could be challenged for invading a private right.

An act of a legislature applies to all; no one without alleging a particular injury as a result of its enforcement can complain of its unconstitutionality.

The permissive order of the Commission in the present instance putting in force the application of paragraph (2) of Section 5 of the Interstate Commerce Act has no greater reaction upon the plaintiffs' interests than if Congress had passed a special act authorizing The New York Central Railroad Company to acquire control of the Chicago Junction properties. In such case it is obvious that unless such act took the plaintiffs' property without due process of law, or otherwise invaded their rights, they could not complain of its alleged unconstitu-

tionality. That in the present instance the complaint is based upon the allegation that the Commission, in sanctioning the franchise accepted by the New York Central, has not acted within the scope of its powers, is a distinction without a difference in the application of the above stated principle, for from the standpoint of the right of the judicial branch of the Government to interfere in the activities of the legislative branch of the Government it is obvious that it is one and the same thing to complain that the legislative department has exceeded its powers by passing an unconstitutional law and that the legislative agent has exceeded its powers by not following the mandate of its principal.

The order of the Commission in the present case represents a conspicuous instance of an administrative body functioning purely in a legislative capacity, for the Commission acted in a prospective situation by determining that facts existed which made applicable to the same a Federal statute. An exactly parallel instance of legislative action would have been that of a committee of either house of Congress reporting that upon an investigation of facts it recommends the passing of a special act of Congress authorizing The New York Central Railroad Company to acquire by purchase of stock and by lease the acquisition of control of the Chicago Junction properties.

As said in the case of *Borgnis* v. *Falk Co., supra,* "Manifestly the legislature cannot remain in session and pass a new act upon every change of conditions; but it may and does commit to an administrative board the duty of ascertaining when the facts exist which call into activity certain provisions of the law."

It is therefore obvious that the inquisition into facts upon which, in the one case, a law of specific application is brought into being, and, in the other case, an existing law of contingent application is brought into play, has exactly the same legal significance. In neither case is a judicial or a quasi-judicial act performed. It is only a legislative step that has been taken—not in, and of itself, to be complained of.

Paragraph (2) of Section 5 of the Interstate Commerce Act is a statute of privilege and not of restriction. It is, in effect, either an act granting a corporate franchise or an act specifying instances in which an existing corporate power may be exercised. In either case it could not be conceived of as an act that in its application would in and of itself take property without due process of law, for a grant of a Government franchise is not subject to attack at the instance of a private individual.

The plaintiffs therefore cannot complain of the act of the New York Central in entering into control and possession of the Junction properties upon sanction of an order of the Interstate Commerce Commission alleged to have been illegally made, for they are strangers to the franchise thus claimed by them to have been unlawfully granted to the defendants, the New York Central and the River Road, and it is not of legal consequence whether their claim be based upon the application of an alleged unconstitutional statute or an alleged unlawful granting of a franchise under a constitutional statute.

The plaintiffs can only complain when the defendant railroad companies unlawfully trespass upon their rights. Such defendants might do this as an incident

of their possession of the Junction properties, but not because of their possession of the same. Therefore, the exercise by the defendant companies of the authority granted them by the Commission has no relation as such to any duty legal or equitable that they may owe to the plaintiffs.

The proposition may be stated in another form as follows:

Though the incident of the control by the New York Central of the River Road and by the latter of the Junction properties may make it possible for them in the operation of those properties to do an unlawful act against the plaintiffs, the responsibility for any such act could certainly not be traced to the usurpation of a tenure in the premises contrary to legal sanction. Under the doctrine of legal causation the one act is in no sense a product of the other. Therefore the permissive order of the Commission has no relation, proximate or remote, to the affairs of the plaintiffs. In other words, the defendant companies being volunteers in the situation how can the order of the Commission amount to a taking of the plaintiff's property without due process of law?

And it should also be added that since it appears that the plaintiffs do not allege that the defendant companies are unlawfully discriminating against them contrary to the provisions of the Interstate Commerce Act, and, indeed, could not well make any such allegation, prior to submitting such claim to the Interstate Commerce Commission, it follows that the bill discloses no issue involving a Federal question.

4. THE PLAINTIFFS ARE NOT PARTIES IN INTEREST WITHIN THE MEANING OF THE PROVISOS CONTAINED IN SECTION 5 OF THE COMMERCE COURT ACT.

Section 5 of the Commerce Court Act provides:

> "That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; * * *"

The purpose of the above quoted provision was to make possible the adjudication in one proceeding of the rights of all parties entitled under principles of law or equity to protection against the order of the Commission. It was not intended to prefer those who were parties to the proceeding before the Commission over those who were not by giving the former a statutory right to court review not based upon a showing of legal injury that was not to be enjoyed by the latter. The Courts have made it clear that no such advantage exists and are conclusive upon the proposition that the term "party or parties in interest" as used in the above quoted provision does not include parties other than those entitled to invoke the intervention of the Federal Courts to prevent the orders of the Commission from unlawfully invading rights of property or other interests entitled to a court's protection.

Directly in support of the above statement is the case of *Edward Hines, Yellow Pine Trustees, et al.* vs. *United States*, No. 91, decided by this court on November 12, 1923, in which it was held that the plaintiffs seeking by bill in equity to set aside an order of the Commission could not maintain the suit merely by showing (if true) that the Commission was without power to make the order and that they must show also that the order alleged to be void subjects them to "legal injury, actual or threatened".

The facts of the case are in principle upon all fours with those of the case at bar. The first paragraph of the opinion reads:

> "This suit was brought against the United States by an Illinois lumber concern in a federal court for Illinois to set aside as void an order entered by the Interstate Commerce Commission against carriers on February 11, 1922. The Commission and the American Wholesale Lumber Association—the petitioner in the proceedings before it—intervened in this suit as defendants. No carrier intervened. The plaintiffs had not been parties to the proceedings before the Commission, nor were they named in the order assailed. The United States moved to dismiss the bill on the ground that the plaintiffs had not shown such an interest in the subject matter as would entitle them to sue; and also for want of equity. The case was heard before three judges on application for a preliminary injunction. It was agreed that the hearing should be treated as a final hearing. The court sustained the motion of the United States and entered a final decree dismissing the bill. That decree is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220."

The issue raised by the plaintiffs was the question of the power of the Commission to make an order requiring certain carriers to cease and desist from collecting a certain penalty charge of $10.00 per car per day on lumber held at reconsignment points, the abrogation of which penalty benefitted the competitors of the plaintiffs. The court in holding that the plaintiffs could not question the validity of the Commission's order said:

> "The mere fact that plaintiffs were not parties to the proceedings in which the order was entered does not constitute a bar to this suit. For it is brought to set aside an order alleged to be in excess of the Commission's power. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 49; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557. But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges cancelled. *They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do.* It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges. Compare *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry.*, 218 U. S. 88, 111. Plaintiffs' right is limited to protection against

unjust discrimination. For discrimination redress must be sought by proceedings before the Commission. Its findings already made, and the order entered, negative such claim in this connection. The correctness of those findings cannot be assailed here; among other reasons, because the evidence on which they were made is not before the Court. *Louisiana & Pine Bluff Railway Co. v. United States*, 257 U. S. 114.

The further claims of plaintiffs are, if possible, even more unsubstantial. They fear that, by reason of the order, they may, in the future, suffer in times of car shortage through the greater use of cars for storage. They fear that the equipment to be used in connection with the railroad which they expect to operate, may be diverted, at some time in the future, from transportation uses. If their fears are realized it will be open to them to apply to the Commission for relief. *As the plaintiffs do not show any interest which entitles them to sue, we have no occasion to consider either the power of carriers to impose the penalty charge or the power of the Commission to order its cancellation.*" (Italics ours.)

Note particularly the statement contained in the excerpt from the opinion that "It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered."

If the statement thus made be of significance in an attempt to set aside a mandatory order of the Commission how much more significant in the instant case is the fact that the order attacked was permissive and that the defendant companies took advantage of it as volunteers.

Another excellent statement of the proposition is found in the case of *Peavey & Co.* v. *Union Pacific R. Co.*, 176 Fed. Rep. 409, heretofore cited. This case was decided by Judges Sanborn, Hook, and Adams, sitting as the Circuit Court for the Western District of Missouri, Western Division. The Interstate Commerce Commission had entered an order forbidding a carrier to allow or pay to the owner of an elevator any compensation for elevation in transit of grain, except in certain cases.

Diffenbaugh and others filed a bill in equity to enjoin the Commission's order on the ground that it was beyond the power of the Commission. The parties were the Transportation Committee authorized to represent the Board of Trade of Kansas City, which was an association of 200 members, consisting of operators of grain elevators, millers and dealers in grain. The bill in equity was demurred to, and one of the objections raised on the demurrer was that the complainants were not parties to the proceeding before the Commission upon which the order challenged was based.

The court in overruling this point held that a careful search of the Interstate Commerce Act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the Commission; that the proceeding in the court was not an appeal; that it was a plenary suit in equity; that the jurisdiction to hear and determine such suits was vested in the Circuit courts; and that the determination of the question what parties may maintain such suits was left by the Interstate Commerce Act to the general rules and practice in equity, and that under them any party whose rights of

property are in danger of irreparable injury from an unauthorized order of the Commission may appeal to a Federal court of equity for relief.

Upon appeal of this case to this Court under the title of *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, this court stated that it was contented to leave the question of jurisdiction on the statement of the court below. While these cases were decided before the enactment of the Commerce Court Act they show, by holding that the right to proceed in a court of equity to enjoin the enforcement of an order of the Commission is not limited to parties appearing in the proceeding before the Commission upon which such order was based, that there is no particular significance to be given to the term party in interest as used in Section 5 of the Commerce Court Act.

The proviso above quoted from Section 5 did not enlarge the jurisdiction of the courts of equity to adjudicate questions which could not otherwise be brought before them solely by reason of the fact that the propounder of any such issue had been made a defendant or had intervened in the Commission proceeding.

A further case in point is that of *McLean Lumber Company* v. *United States*, 237 Fed. Rep. 460, the opinion in which was rendered by Judges Warrington, McCall and Sanford, sitting as the District Court in the Eastern District of Tennessee, Southern Division. In this case four corporations engaged in business at Chattanooga, Tennessee, filed a petition against the United States to set aside certain orders made by the Interstate Commerce Commission in the matter of rates on logs in

carload shipments. The record shows that the increased rates on the logs fixed by the orders of the Commission had caused the plant of one of the petitioners to be wholly abandoned, that of another to be shut down, and those of two others to be greatly limited in their operations. The court held that the right of a shipper to have his property carried at a reasonable rate in the transaction of his business is a property right; that to enforce such right our system of jurisprudence does not leave him remediless; that where an action at law is inadequate a remedy in equity must and does exist; that the common-law remedy is so abrogated by the Interstate Commerce Act that a shipper cannot now, consistent with its provisions, maintain his common-law action for excessive rates exacted on interstate shipments, where such rates have been duly published by the carrier and not found by the Commission to be unreasonable; and that in such case a shipper must primarily invoke redress through the Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable.

It follows that when rates fixed by an order of the Commission are unreasonably high, and thereby invade his property rights he has an appropriate remedy to protect his interests in the Federal courts. The court thereupon held that the petitioners by filing their petitions before the Commission complaining of the new rate which the railroad companies proposed to establish, acquired a legal status before the Commission as parties in interest to the proceedings had upon such complaint.

The court then says:

> "Construing the foregoing provisions of the Commerce Court Act in their entirety, we are of opinion that it was intended that any person who had acquired a standing *as a party in interest* in proceedings before the Commission should have the right to appear as a party in any suit brought in the court involving the validity of an order therein made by the Commission, as distinguished from the mere right of intervention given to other persons who were *not parties in interest* before the Commission, but merely '*interested in the controversy or question*,' and that the right thus given to a party in interest before the Commission is not limited to his appearance as an intervener in such proceedings as may be instituted by other parties in interest before the Commission, but includes the right to appear in the court as a party plaintiff in proceedings which he himself may bring to test the validity of the order of the Commission. And we hence conclude that, under the statutory provisions above quoted, the petitioners herein, having duly appeared before the Commission as complainants against the rates proposed to be established under the new schedule filed by the railroad company, not only became parties in interest before the Commission in the proceedings had upon such complaint, but that as such parties in interest in such proceedings they are now entitled, as of right, to appear as parties plaintiff under their petition in this court in proceedings to set aside the order of the Commission." (Italics ours.)

The language above quoted would seem to suggest that the court placed a special significance upon the fact

that the plaintiffs in the equity proceeding had appeared in the proceeding before the Commission. However, an analysis of its conclusions shows that it made a clear distinction between a party in interest having a property right to protect and thus entitled to initiate a proceeding in court, and one who was merely "interested in the controversy or question". The latter, under Section 5 of the Commerce Court Act, might intervene in an existing controversy having proper parties on both sides, but obviously could not initiate a proceeding because of being a stranger in interest to the concrete case.

Moreover the court was required to attach significance to the fact that the plaintiffs had appeared before the Commission, for, as the court said, in the instance of protecting one's common law rights against the exaction of an unreasonable rate, the Commission has succeeded the courts as the body to be primarily invoked for redress.

In *Nashville Grain Exchange* v. *United States* (case 46) and *Louisville & Nashville Railroad Company* (case 47), 191 Federal Reporter 37, the court held that the Grain Exchange and the Board of Trade were parties in interest within the meaning of Section 5 of the Commerce Court Act because the petitions and affidavits in the cases showed that the enforcement of the order would result in the destruction of the existing business of grain dealers of Nashville, and that said grain dealers are members of the Nashville Grain Exchange and the Nashville Board of Trade.

The court said that, while there may be room for argument as to the character of the interest which such

communities, associations, corporations, firms, and individuals should have in the controversy in any suit in this court, there certainly can be no question but that the petitioners in case No. 46 are interested in the question to be decided in case No. 47.

In the case of *Atlantic Coast Line R. Co.* v. *Interstate Commerce Commission*, 194 Federal Reporter 449, it was specified, as a ground of demurrer to the bill in equity brought to annul the order of the Commission prescribing a rate alleged to be unreasonable, unjust and unduly discriminatory, that the Georgia Railroad, the Norfolk & Western Railway Company, the Clyde Steamship Company, and the Old Dominion Steamship Company were not parties to the proceeding before the Commission which resulted in the making of the order complained of, and that, therefore, there is a misjoinder of petitioners. The court held that the carriers named, although not parties to the proceeding before the Interstate Commerce Commission, nor named in the order made by the Commission fixing rates on commodities between certain points, were competitors of the carriers subject to the Commission's order and were therefore necessarily affected by the order. Under such circumstance they were held to have such an interest as entitled them to be joined as parties complainant with the petitioning railroad company made subject to the Commission's order to enjoin its enforcement.

Counsel cite this case in support of their argument. In so doing they ignore the significance of the fact that competitors made up both of carriers subject to the Commission's order to reduce rates and those who were not so subject were making common cause to annul the order.

In such case all parties obviously had to meet the prescribed rate and were therefore directly affected by the order. Such a situation bears no resemblance to an instance where one carrier seeks to prevent another carrier from acquiring control of a railroad because of a fear that the latter will thereby gain an advantage in opportunity to solicit competitive traffic. In the instant case the permissive order of the Commission authorizing the acquisition required nothing of the defendant railroad companies calling for responsive action by their competitors, and it certainly gave no license to such defendants to commit a legal injury direct or indirect upon the plaintiffs.

In the case of *Merchants & Manufacturers' Traffic Association* v. *United States*, 231 Fed. Rep. 292, the court held that traffic associations formed for the purpose of representing jobbers and merchants had an interest, as representatives of a class, directly affected by the Commission's order suspending in a particular case the application of the long and short haul requirements of Section 4 of the Interstate Commerce Act, entitling them to file a bill in equity seeking the suspension of such order. The jurisdiction was sustained wholly upon the principle of class suits and Equity Rules No. 37 and No. 38, providing, respectively, that all persons having an interest in the subject matter of the action and in obtaining the relief demanded may join as plaintiffs, and that when the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

This case was reversed by this Court in the case entitled *United States* v. *Merchants' etc. Association,* 242 U. S. 178. While this court did not directly pass upon the reasoning which the court below regarded as sufficient to permit the traffic associations to file the bill as parties in interest it held that to redress the grievance of which they complained was to invade the administrative powers of the Commission.

In the case of the *City of New York* v. *United States,* 272 Fed. Rep. 768, the court, while denying relief on the merits, held that the City had the right to maintain a bill to enjoin the enforcement of an order fixing rates to be charged by two railroad companies. The Court said:

> "The city, by reason of its interest in its duty to the residents and taxpayers of the locality, *together with its interest as a shipper and receiver of milk and cream for its institutions, has, as such, a right to legally commence and maintain this suit.* It also has such interests in the Staten Island Rapid Transit Railway Company, as well as an interest and rights in the franchise of said railway company." (Italics ours.)

In *Village of Hubbard, Ohio* v. *United States,* 278 Fed. Rep. 754, it was held that the Village could enjoin an order of the Commission fixing rates where the order was beyond the jurisdiction of the Commission, and where the order affected the franchise granted by the Village. The Court said:

> "* * * if a franchise contract made by a municipality with a carrier is the basis of the inquiry,

> that municipality should be made a party and be given an opportunity to be heard, and, if so, it has the same right as any other party in interest to seek redress in this court against an erroneous or unlawful order of the Commission."

In the case of the *State of Tennessee* v. *United States*, 284 Fed. Rep. 371, the court held that the right of the State, either in its own interest as a contingent shipper, or in the right of its citizens, to attack an order of the Interstate Commerce Commission affecting rates within the State, seems not to be doubted. The court in so holding was undoubtedly correct, as the right of the State to have its property transported free or at a reduced rate was one given by the Interstate Commerce Act and is a property right, the protection of which would entitle the State to seek the aid of the courts.

In the case of *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485, the State filed an original bill in this court to restrain the carriers from applying an order of the Interstate Commerce Commission increasing intrastate rates in North Dakota. The Court refused to entertain jurisdiction of the bill on the ground that the State should be remitted to the remedy provided by the United States statutes, namely, a suit to set aside the order brought against the United States in the District Court as provided by the Commerce Court Act and the Act transferring its jurisdiction to the District Court. The contention was made that the state cannot sue on account of private grievances of its citizens. The Court, in refusing to pass on this question and deciding the case upon the ground above stated, said:

"The defendants move to dismiss the bill. The first reason offered is that a State cannot sue on account of the private grievances of its citizens. By an amendment the State alleged a property interest in itself but that amendment did not cover the extent of the relief asked, and the case is argued on the broad ground originally taken. We shall leave this question on one side, without deciding whether this case can be distinguished from *Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 220 U. S. 227, 286, et seq."

In *Oklahoma* v. *A., T. & Santa Fe Ry.*, 220 U. S. 277, it was held that a State in its corporate capacity has no such interest in the rights of shippers as to entitle it to maintain an original action in the Supreme Court against a carrier to restrain it from charging unreasonable rates within its jurisdiction. In that case this court said at pages 286, 287 and 289:

"In the present case, the State seeks to enjoin the defendant company from charging more than the Kansas rates on the transportation of lime, cement, plaster, brick, stone, crude and refined oil. But the State, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates and to compel the railway company to respect the rights of *all* of the people of Oklahoma who may have occasion to ship such commodities over the railway. * * * We are of opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit 'in which a State shall be

> a party,' are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers, generally".

In view of what this court said in the case of *North Dakota* v. *Chicago & N. W. Ry. Co., supra*, it is questionable whether it would hold that a state is a proper party to maintain a bill to enjoin an order of the Commission unless it is established that some property or other right of the State, either as shipper or otherwise, is violated by the order.

The above authorities demonstrate that in every case where an attempt to invoke the jurisdiction of a court of equity to set aside or enjoin an order of the Commission was sustained it was at the instance of a party whose legal or equitable rights were destroyed or impaired by the order of the Commission.

If, as decided in *McLean Lumber Company* v. *United States, supra*, the proviso in Section 5 of the Commerce Court Act authorizing a party in interest to appear of his own motion and as of right in any suit wherein is involved the validity of an order of the Interstate Commerce Commission and the interests of such party includes the right to initiate any such proceeding, then it is beyond question that he must so proceed to prevent the destruction or impairment of his legal or equitable rights. As no legal or equitable rights of the plaintiffs in this case have been violated by the order of the Commission they have no standing to maintain the bill here filed, even though they have been permitted to appear

before the Commission in opposition to the application of the defendant railroad companies.

5. THE PLAINTIFFS ARE NOT PARTIES IN INTEREST UNDER THE PROVISIONS OF THE INTERSTATE COMMERCE ACT:

The plaintiffs' sole justification for initiating this proceeding is set out in Subdivision XII of their bill. They base their claim for equitable relief upon the proposition that the acquisition of control by the New York Central of the Junction and River roads approved and authorized by the Commission in its said order has resulted in diverting a large portion of competitive tonnage from the rails of the plaintiffs to the rails of the Central, or other routes in the New York Central System, causing an annual loss of revenue to the plaintiffs of $10,000,000, that such diversion, with consequent loss of revenue constitutes irreparable loss and injury.

The public interest as regulated by the Interstate Commerce Act is not concerned with the fact that The New York Central Railroad Company in acquiring control of the Chicago River & Indiana Railroad and Chicago Junction Railway properties may develop opportunity in fair competition with its competitors to gain traffic that might otherwise move over the lines of its competitors.

Speaking of this very question the Commission said in its report:

> "The present management of the Central disclaimed any intention of making any changes in the method of handling competitive traffic or the general plan of operating the Junction properties, and those assurances may be taken at their face

> value, especially since the contrary policy would clearly be against the self interest of the Central, in that it would thereby lose the good will of the shipper. There is, of course, every indication that the Central will be able to build up its own line-haul traffic as the result of its connection with the management of the Junction, and it by no means follows that harm to the public may result from legitimate effort and initiative to that end." (Record 22.)

It is the intent of the Interstate Commerce Act, particularly as amended by the provisions of the Transportation Act, to promote the public interest by developing and intensifying competition among common carriers in a fair field. This is evident not only from express declarations, contained in the Act, but because the chief benefit to be derived by the public from private ownership of common carriers is to be found in enterprise stimulated by rivalry among carriers to secure business.

In the case of *United States, et al.* v. *Illinois Central R. R. Co., et al.*, Nos. 40 and 38, decided January 7, 1924, this court said:

> "The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate;"

A fair field means the right of each carrier to use its own railroad and its own terminals and facilities to promote business without the handicap of unfair methods on the part of its competitors where its facilities come in contact with theirs in the handling and the development of traffic.

Competition means the right of each carrier to take all legitimate opportunity to promote its own business both by developing industrial territory where it did not exist before, by physically extending and developing its terminals, where so to do would be to make its operation more economic and would promote shipping facilities, and by seeking to increase by all fair means its proportion among competitors of existing business through enterprise in service, for in the encouragement of the incentive on the part of each carrier to extend its facilities and to improve its service lies the surest means of promoting the public interest.

The Interstate Commerce law protects each carrier in the above respects by providing for equality among all in the interchange of traffic and by even giving opportunity in the public interest for one carrier upon reasonable terms and compensation to use, under certain circumstances, the terminals and facilities of another.

Paragraph (3) of Section 3 requires that all carriers shall "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

Paragraph (4) of Section 3 gives the Commission power, if it finds it to be in the public interest and to be practicable without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, "to require the use

of any such terminal facilities * * * by another carrier or other carriers" upon just and reasonable terms.

In the absence of an agreement among carriers (except in the case of emergency provided for in paragraph (16) of Section 1) the Commission has no power under the law to control or regulate the division of traffic. Paragraph (1) of Section 5 of the Interstate Commerce Act authorizes the Commission after hearing upon application of carriers who desire to divide traffic and earnings to permit them so to do, but such authority can be given only when the Commisison is of the opinion that it "will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition." In such case all carriers must assent to the division so authorized by the Commission.

Thus the Interstate Commerce Act by its negation of the right of the Commission to regulate without the consent of carriers the division of traffic emphasizes the idea that the appropriation by one carrier of the business of another through competition is not only not of itself injurious to the public interest but, indeed, is in furtherance of the same to the extent that such business is acquired through superior service and enterprise.

It is thus the declared policy of the Interstate Commerce Act that in the public interest competition among carriers to develop and acquire traffic shall be as free as possible.

It, therefore, follows that the loss of business by one carrier through the development of the terminals of another carrier does not fall, as a matter of investigation, within the scope of the terms public convenience and necessity and public interest, as used in the provisions of the Interstate Commerce Act.

6. THE PLAINTIFFS ARE NOT PARTIES IN INTEREST AS DEFINED BY PRINCIPLES OF EQUITY:

The bill on its face shows it to be in substance if not in form a proceeding brought by several carriers against a competitor to enjoin the latter from exercising certain powers on the ground that such powers are *ultra vires* or based upon a franchise or license alleged to have been unlawfully granted.

The authorities all sustain the proposition that competing carriers have no peculiar interest which entitles them to enjoin a rival from exercising powers which are *ultra vires* or founded upon franchises that are questioned.

In the case of *Railroad Company* v. *Ellerman,* 105 U. S. 166, the City of New Orleans had been authorized by charter and statute to erect and maintain wharves within its limits. A subsequent statute granted the right to a railroad company to occupy a certain area for wharfage purposes, exempt from control by the municipal authorities. Ellerman, as assignee of the city, complained of an alleged invasion of his wharfage rights. Mr. Justice Matthews in rendering the opinion of this court that the claim was without merit made the following observations (p. 173):

> "The sole remaining question then, is whether Ellerman, as assignee of the city, has any legal interest which entitles him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with

himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the company. *But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting ultra vires?* The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises because it is a trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. *The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable*

right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed." (Italics ours.)

In *Geneva-Seneca Electric Co.* v. *Economic Power & Construction Co. and City of Geneva*, 136 App. Div. (NY) 219, it was held that a corporation furnishing electricity to a city under a non-exclusive franchise cannot maintain an action to enjoin a competing company from furnishing a similar service upon the ground that such company lacks corporate existence. In that case, the Court said (p. 222):

"In this case, so far as I am able to understand the facts, the proposition is this: A corporation legally constituted is serving a city and its inhabitants with electric lighting and power having no exclusive franchise. It is conducting a profitable business. Another alleged corporation, which we assume has no corporate rights, assumes with the consent of the city to engage in the same business. Can such first corporation complain because the acts of the other, although in violation of law, may tend to decrease its revenue or earning capacity? * * * The primary question in this controversy is: Has the plaintiff the right to attack the validity of the defendant power company? * * * In this case there is no question of public nuisance, but rather it resolves itself into the proposition as to whether the plaintiff may attack the validity of the incor-

poration of an alleged competing company, which competition will injure or impair the business of the plaintiff. We think that upon authority the plaintiff's contention is not tenable. (Old Forge Co. *v.* Webb, 31 Misc. Rep. 316; aff'd., 57 App. Div. 636; Empire City Subway Co. *v.* Broadway & Seventh Avenue R. R. Co., 87 Hun, 279; aff'd., 159 N. Y. 555.) * * * We conclude that the whole trend of authority is to the effect that such plaintiff cannot in an action brought to obtain an injunction question the authority of the competing corporation or the right of the individual in the premises. If such were not the law, then every corporation could raise the question as to the legality of its competing neighbor. * * * It seems to me clear that such question should not be left to warring competitors, but that if an alleged corporation is seeking to exercise corporate rights in violation of law, in the first instance the Attorney-General of the State should be asked to take proceedings to prevent the exercise of such alleged power. *If the contention of the plaintiff should prevail, it would be competent for every corporation to bring suit against every other alleged corporation competing with it, because of the fact, as alleged, that it had not fully complied with the provisions of law respecting its incorporation.* It seems to me that it is the most sensible rule to hold that such action cannot be maintained because of the fact that an alleged competitor may not have been organized in accordance with the provisions of law. * * *" (Italics ours.)

The case of *The Christopher & Tenth St. Ry. Co.* v. *The Central Crosstown R. R. Co.*, 67 Barb. (NY) 315, in-

volved the right of the defendant to lay its tracks and run its cars on certain streets. The Court said (p. 317):

> "The rights conferred upon the plaintiff by its charter are not exclusive, and do not prevent the legislature from conferring authority to fix the terminus of the defendant's road at the North River, at the point designated. Nor does it confer upon the plaintiff the power or duty of interfering to protect the public interest, either on behalf of the city or of the general public. If there was any excess of power in the claim of defendant to run its track to the point in question, the public alone could interfere to restrain it by injunction, unless it should be shown that some actual interference with the tracks as laid at that time by the plaintiff had been done, or was about to be attempted."

In the case of *New England R. Co.* v. *Central Ry. & Elec. Co. et al.*, 36 Atl. 1061, the Supreme Court of Errors of Connecticut, in answering an attempt of a street railway company to enjoin a rival from constructing a competing line, said following *Railroad Co.* v. *Ellerman, supra:*

> "The only injury, then, of which the plaintiff could be heard to complain in the court below, was an invasion of some of its legal or equitable rights. If none of these were threatened by the acts complained of, the plaintiff was not entitled to the injunction. Now, if any right at all of the plaintiff's legal or equitable, was threatened or invaded, by the *ultra vires* acts complained of, it was the claimed right to be free from the injurious competition of a rival in the business of carrying passengers and freight; and the question is

whether any such legal or equitable right existed in favor of the plaintiff upon the facts set up in the second count. Counsel for the plaintiff concedes that no such right exists in favor of the ordinary private corporation. * * * But the franchise of the plaintiff is not, under our law, exclusive in any such sense. The plaintiff has not, and does not claim to have, a monopoly, in this sense, of the business of carrying freight and passengers between Hartford and New Britain. It cannot and does not claim, under the second count, that, if the defendants had been acting *intra vires*, in doing what they proposed to do, it would have been entitled to an injunction. Any individual is at liberty to engage in the business of carrying passengers and freight between Hartford and New Britain. * * * The defendants, if acting *intra vires* in building the proposed street-railway line, were at liberty to engage in the same business; and in each of these cases, although the existence of such a competitor might more or less seriously diminish the plaintiff's receipts, it would be without redress at law or in equity, because the competition would be lawful, both as against the state and the plaintiff, and no right of the plaintiff, legal or equitable, would be invaded by such competition. * * * The acts complained of in the second count are merely *ultra vires* acts, illegal in a certain sense as against the state, but in and of themselves invading no right, legal or equitable, of the plaintiff. Neither the plaintiff's charter, nor any law of this state, imposed a duty upon the defendants towards the plaintiff not to build a railway deviating from the chartered route, or not to build one beyond the chartered termini, or not to exercise powers and rights not granted to them. The

> state or the stockholders may restrain the defendants from exercising powers not conferred by their charters, but this does not confer any right of action in this respect upon the plaintiff, unless its own legal or equitable rights are invaded by such exercise."

In L. R. A. 1916 B, page 1087, appears an annotation on the right of a public service corporation to challenge the power or privileges of a rival. The authorities cited are in harmony with the principle case to which the annotation is attached, appearing in the report at page 1083, namely, *Baxter Tel. Co.* v. *Cherokee Co. Mut. Tel. Assn. et al.*, 94 Kan. 159, 146 Pac. 324.

In this case it was held that a telephone company had no interest in the establishment of a second company in a competitive field, which would authorize it to maintain a suit to restrain a rival company because it had not obtained a certificate of public convenience and necessity from the Utilities Commission. On this point, the Court said:

> "From these rulings of the trial court the plaintiff below submits two propositions for our consideration: (a) Has the Baxter Telephone Company such a peculiar interest in this matter, different from the general public, that it may maintain this suit in its own behalf * * *. Ordinarily the usurpation of a corporate privilege or public franchise can only be challenged by an action in the name of the state by its proper officer. In Kansas that proper officer would be the county attorney. Gen. Stat. 1909, Sec. 2226; Eble *v.* State, 77 Kan. 179, 93 Pac. 803, 127 Am. St. Rep. 412. The Attorney General is likewise frequently

called upon to challenge the exercise of some unauthorized corporate power. *State ex rel. Attorney General* v. *Kansas City Stockyards Co.*, 94 Kan. 96, 145 Pac. 831; *State ex rel. Attorney General* v. *Garfield County*, 54 Kan. 372, 38 Pac. 559.

"The cases of *Houser* v. *Smith*, 80 Kan. 260, 101 Pac. 1001, and *State ex rel. Attorney General* v. *Bentley*, 80 Kan. 227, 101 Pac. 1073, considered together, are instructive. The former, although but briefly reported, was an injunction suit against the county treasurer of Cove County to restrain him from collecting a high school tax on the ground that 'there was and is no high school in said county of Cove which has been established according to law.' The plaintiffs were private citizens and were non-suited. But a radically different result was obtained when an officer of the state challenged the legality of the organization of the high school. In the latter case the organization of the high school was declared void.

"By the railroad and utilities acts the power is conferred upon the attorney for the Public Utilities Commission to challenge the exercise of unauthorized corporate acts. Gen. Stat., 1909, Sec. 7182; Laws 1911, c. 238, Secs. 2, 7; *State ex rel. Attorney for Public Utilities Commission* v. *Wyandotte County Gas Co.*, 88 Kan. 165, 127 Pac. 639. The latter case is quite pertinent. *There the gas company had received the assent of the city to raise the rates for gas; but it had not received the assent of the Public Utilities Commission. In the case at bar the appellee, Baxter Local No. 121, has received the assent of the city, but that of the state commission is still wanting, if*

such assent is required. These illustrations show that, if there is a usurpation of powers by the appellees, the state has provided itself with officers to challenge such usurpation.

"A private plaintiff, who is likely to be injured in some special manner, or whose situation is peculiarly affected by the exercise of a usurped power, could maintain the action, but no such case is presented here.

"In *Coffeyville Gas Co.* v. *Citizens' Gas Co.*, 55 Kan. 173, 40 Pac. 326, it was said:

> 'A corporation organized for the purpose of supplying a city with natural gas, and authorized by an ordinance passed by the city council to use the streets and public grounds of the city for the purpose of laying its mains and pipes, has no standing in court to test the right of a rival company to use the streets for a similar purpose, or the validity of subsequent ordinances, under which the defendant claims the right to use the streets.'

"An especially apt case in this connection is *Amusement Syndicate Co.* v. *City of Topeka*, 68 Kan. 801, 74 Pac. 606, where the owner of an opera house sought to enjoin the use of a large public auditorium for public entertainment for profit. * * *

"Under the demurrer, all the material allegations of plaintiff's petition must be taken as true, but it does not appear that a mere rival in business has such an interest as will permit it to maintain an action of this character. Assuming for the moment that the business of the Baxter Local No. 121 is of such a character that it would require a license from the Public Utilities Commission before engaging in the telephone business in

Baxter Springs, it must be conceded that, in the exercise of a sound discretion, the Public Utilities Commission might grant that license; and, if it did, its competition for public patronage would be just as keen, and it would occupy the streets and diminish and divide the revenues of appellant just as much with a license as without one. Licenses to engage in any trade or calling within the limits of a city are common. Hackmen, draymen, pawnbrokers, and the like are required in most Kansas towns to have licenses issued by the city authorities. But we think the licensees of these callings could hardly maintain an injunction suit against any person who presumed to exercise any such calling without a license; yet the competition of an unlicensed hackman or pawnbroker would tend to lessen the business and diminish the revenues of those lawfully engaged in such business. Doctors, lawyers, and school-teachers require a license or certificate to practice their professions; but none of these could maintain a suit to enjoin another person from engaging in any of their peculiar professions without such certificate, notwithstanding any probable loss of income on account of the invasion of their professions by unlicensed practitioners. We can see no fundamental difference between the telephone business and any other business, except that, owing to its importance and general use, one telephone system is likely to be more satisfactory and less expensive than where two or more such companies occupy the same field. This the Legislature has recognized, and has provided that, as a matter of public policy, no public utility like a telephone company, excepting one strictly mutual, will be authorized to do business until it has obtained a certificate

or a license of authority as a public convenience and necessity within the community where it seeks to do business. This is a part of the state's program for the regulation of public utilities but the administration of that program, and the enforcement of the law pertaining thereto, is vested in public officers authorized to use the name of the state to carry it into execution. Prior to the passage of the public utilities act, any number of telephone companies, which could persuade a city government to grant a franchise for the use of the streets and alleys, might establish a telephone system within such city. The competition of these would affect the business and affect the revenues of other utilities of the same character which had previously been established. The enactment of the public utilities law was an extension of the police power of the state over such utilities, but it did not grant any additional rights to such utilities as were established and maintained before the adoption of that act; and the Baxter Telephone Company procured no rights thereunder which it can maintain against possible competitors. The public utilities law was not enacted as an extension or enlargement of the powers and privileges of an existing telephone company." (Italics ours.)

In *Coffeyville Mining & Gas Co.* v. *Citizens' Natural Gas & Mining Co.*, 55 Kan. 173-179, 40 Pac. 326, cited by the Kansas court, where one company sought to prevent another from interfering with its monopoly of gas business, the court said:

> "A private person or corporation will not be recognized in a court of justice as the guardian of purely public interests, nor to further its private ends by assuming that character."

In *Burns* v. *St. Paul City Ry. Co.*, 101 Minn. 363, 112 N. W. 412, the publisher of a weekly newspaper sought to enjoin a street railway from placing advertisements on the inside of its cars. It was held that the possible loss of business was not sufficient to entitle the plaintiff to question the acts of the street railway, whether *ultra vires* or not.

The following statement appears in the case of *Camblos* v. *Phila. &c. R. Co.*, Federal Case No. 2331:

> "The Adams Express Company is entitled to protection only against such illegal acts of the defendant as are prejudical to its rights and interests. If the railroad company has assumed the exercise of any franchise not conferred by its charter, the express company is not authorized to call it to account. If, without right, it seeks to appropriate the profits of a business of which the express company before had the monopoly, it does not thereby incur any liability to the express company. Their relations to each other grew out of the corporate duties of the defendant as a common carrier, and it is only for a failure or refusal to perform any of these duties to the express company as a shipper that the latter has a right to complain."

The case of *The Golconda Nor. Ry.* v. *The Gulf Lines C. R. R. of Ill.*, 265 Ill. 194, involved a controversy between two railroad companies over the possession of a parcel of ground and the right to occupy it for the construction and operation thereon of a railroad. The court in discussing the right of one company to challenge the powers of the other, said (p. 203):

"We have held that the evidence justifies the conclusion that the Toledo, St. Louis and New Orleans Railroad Company had made a location of its road on July 23, 1909. The sale and conveyance of its located line, right of way, franchise and other property to the appellee, if valid, conveyed to the latter the prior right which the grantor had to construct a railroad on this located line. It is insisted, on behalf of the appellant, that the attempted conveyance to the appellee was contrary to public policy and beyond the power of the grantor, and was therefore void and of no effect whatever. A railroad corporation has not, as a general rule, the power to sell its road and franchise without statutory authority. The powers of all corporations are such, only, as are conferred by the statute under which they are organized, and a public service corporation cannot, without the assent of the state, sell or lease its entire property and franchise to another corporation and disable itself from performing the duties to the public imposed by its charter. (*Chicago Gas Light Co.* v. *Peoples Gas Light Co.*, 121 Ill. 530; *Union Trust & Savings Bank* v. *Kinloch Telephone Co.* 258 id. 202; *Thomas* v. *West Jersey Railroad Co.* 101 U. S. 71; *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 id. 24.) *It would not, however, enable the appellant to maintain its bill even if we were to hold the deed of the Toledo, St. Louis and New Orleans Railroad Company to the appellee void.* The only effect of such holding would be to leave the title in the former company, but it would not confer any right upon the appellant or give to it any title or enable the grantors of the Toledo, St. Louis and New Orleans Railroad Company to grant any title to the complainant. The fact that

because of its failure to finish the road and put it in operation within ten years from the time of filing its articles of association section 26 of the Railroad and Warehouse act declares that the corporate existence and powers of that corporation should cease does not affect the question. The State, alone, could take advantage of the failure of the company in this regard, and until it did so no other person could question its existence or the validity of its corporate acts. *Ross* v. *Chicago, Burlington & Quincy Railroad Co.*, 77 Ill. 127; *Chicago and Eastern Illinois Railroad Co.* v. *Wright*, 153 id. 307.

"Admitting that the conveyance by the Toledo, St. Louis and New Orleans Railroad Company was beyond the corporate powers of that corporation, the law does not permit third persons having no interest in the corporation or its trust to dispute the validity of its conveyances. The *ultra vires* acts of the corporation may be objected to by the State, the corporation, its stockholders or creditors, or the persons with whom the *ultra vires* transactions are had, but not by third persons having no interest in the subject matter. Railroad corporations have power, under certain circumstances, to make sales and conveyances of real and personal property. Whether any particular conveyance is in excess of this power is a question which concerns only the corporation itself, the State, or those persons having some interest or title in the corporation or the property involved. * * *

"The appellant has no such interest as entitled it to enjoin the appellee from constructing a railroad in this pass. *The only injury of which it can complain in a judicial tribunal is the invasion of*

some legal or equitable rights. It alleges that the appellee is acting beyond its authority under the law because the conveyance under which it claims was beyond the charter power of its grantor to make. This conveyance, however, did not injuriously affect any right of the appellant, and it has, therefore, no ground to complain. Neither the Toledo, St. Louis and New Orleans Railroad Company nor the appellee owed any duty to the appellant in regard to this land or to the title thereto. A stockholder in the grantor company might have an interest in restraining it within the limits of its corporate powers and the State might have an interest in preventing the usurpation and perversion of its franchises, but the appellant has no interest in these questions and cannot raise them to enable it to seize the property which is the real subject matter of the controversy, *New Orleans, Mobile & Texas Ry. Co.* v. *Ellerman,* 105 U. S. 166." (Italics ours.)

In the case of *New Hartford Water Co.* v. *Village Water Co.*, 87 Atl. 358, where one water company sought to enjoin another water company from laying pipes in streets occupied by the pipes of the plaintiff, the Supreme Court of Errors of Connecticut held that the plaintiff could not question the validity of the defendant's organization or of its acquiring the property of the voluntary association which it succeeded. The Court said (p. 360):

> "Whether the defendant is exceeding its charter powers is a question to be raised only by its stockholders or by the state or by parties who receive some special damage from the claimed *ultra vires* acts. *New England Railroad Co.* v. *Central Railway & Electric Co.*, 69 Conn. 47, 58, 59, 36 Atl.

1061; *Railroad Company* v. *Ellerman*, 105 U. S. 166, 173, 26 L. Ed. 1015. * * *

"The Court has found that the defendant has not done, and does not propose to do, any acts that have been or will be attended by any actual and serious damage to the plaintiff or that interfere with it in the management or maintenance of its water system and charter rights. This finding precludes the defendant (plaintiff), for the reasons already stated, from attempting to question the validity of the defendant's organization or whether it has properly acquired the property and rights of the voluntary association named and recognized as such in its charter."

A case on all fours with the instant case is that of *Home Tel. Co. of Grass Lake* v. *Michigan R. R. Comm.*, 140 N. W. 496. In this case the defendant telephone companies had applied to the Michigan Railroad Commission praying that certain contracts be authorized by said Railroad Commission to be consummated. Such contracts were in effect a sale of the properties of each of the defendant companies to the defendant Michigan State Tel. Co. The plaintiff, together with certain other companies, asked and obtained leave to intervene before the Commission, and a hearing was had as a result of which the Commission authorized the execution of the contracts. The plaintiff then brought this suit to restrain the consolidation of the telephone companies as authorized by the order of the Commission. The Michigan statute authorized *any telephone company or other party in interest*, being dissatisfied with any order of the Commission, to commence an action within thirty days from

the issuance of the order in the Circuit Court in Chancery against the Commission to vacate and set aside any such order. (Sec. 12 of Act No. 138 of the Public Act of Michigan, 1911.)

The ground for the relief was similar to that set up in the instant case. The bill averred "that such merger and consolidation of said companies will give the said Michigan State Telephone Company a monopoly of the telephone business to the exclusion of the independent telephone companies within a portion of the state of Michigan, to the great damage and irreparable injury of your orator and the public generally."

It was held that the plaintiff could not maintain the bill. The Court said:

> "The first ground of the demurrer urged by defendants is that the Attorney General is a necessary party to these proceedings, and a private individual may not maintain this form of action.
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> * * * * * * * *
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> "We think it is well settled in this state that grievances which afflict the community must be redressed by those to whom the law has intrusted the duty of interference. Such has been the rule of law in this state for many years. *Miller* v. *Grandy*, 13 Mich. 540. It was there held that private persons could not assume to themselves the right to institute proceedings in chancery to redress grievances on behalf of the public. They can only proceed where their individual grievances are distinct from those of the public at large, and such as give them a private right to redress. In that case Justice Campbell said: 'This bill can only be sustained by holding that every private citizen has the right to call public officers to ac-

count for their official misconduct, affecting the body politic, and not specially one man more than another. There were a few cases decided in the Supreme Court of New York, which recognized such a right; but they have been over-ruled repeatedly, and the doctrine is now well settled that a private taxpayer, suffering under no special grievance, is not even a proper party to a bill filed to restrain threatened misconduct. * * * And grievances which afflict the community must be redressed by those to whom the law has intrusted the duty of interference.'

"In *Steffes* v. *Moran*, 68 Mich. 291, 36 N. W. 76, it was held that public wrongs must, in this state, be redressed by the people's public agents, and not by private intervention; and that the case of *Miller* v. *Grandy*, *supra*, laid down the Michigan doctrine on this subject, with its reasons, and has been adhered to.

"In *Sweet* v. *Smith*, 153 Mich. 674, 117 N. W. 59, this court was asked to review an order of the circuit court for the county of Wayne denying a mandamus, prayed for by the relator and others, compelling the respondent 'to execute and enforce all the laws pertaining to the preservation of the Sabbath, or the first day of the week, at the baseball park of the Detroit Club.' The purpose of the proceeding was to prohibit Sunday baseball playing in the city of Detroit. In a per curiam opinion this court said: 'It does not appear that the grievance of the petitioners is any other than that sustained by other citizens of the city of Detroit. Neither does it appear that the Attorney General of the State has refused to take action in the matter. Under these circumstances, petitioners have no right to relief. The grievance

complained of is purely a public grievance, and redress should have been sought by the people's public agents, and not by private intervention. See *People ex rel Russell* v. *Inspector and Agent of State Prison*, 4 Mich. 187; *Miller* v. *Grandy*, 13 Mich. 540; *Peo. ex rel Delbridge* v. *Green*, 29 Mich. 121; *Peo. ex. rel McBride* v. *Board of Supervisors of Kent County*, 38 Mich. 422; *Steffes* v. *Moran*, 68 Mich. 291, 36 N. W. 76; *Smith* v. *City of Saginaw*, 81 Mich. 123, 45 N. W. 964. The decision of the Circuit Court was clearly correct, and we decline to review it in this court.'

"This subject was fully discussed and many cases cited in the recent case of *Harvester Company* v. *Circuit Judge*, 163 Mich. 55, at pages 66 and 67, 127 N. W. 695, 30 L. R. A. (N. S.) 580, Ann. Cas. 1912A, 1022. Under the provisions of Act 255, Public Acts of 1899, and the supplementary act of 1905, relating to trusts and monopolies, the Attorney General is directed to institute *quo warranto* proceedings, or proceedings by injunction or otherwise, in so far as a corporation is concerned, and no such right of action is given, as is claimed here.

"In our opinion this ground of the demurrer was well taken and should be sustained."

By parity of reasoning if in the instant case it be contended that the Interstate Commerce Commission has in granting its license to the New York Central exercised powers not given it by statute or powers vested in it in an unwarranted manner to the public injury the Attorney General is alone entitled to seek redress for such a public wrong.

If in answer to this, counsel for the plaintiff state that the bill does not set up a public injury, then it shows

no wrong whatever, for certainly the courts cannot be called upon to regulate the division of traffic among competitors.

The above authorities therefore establish that even assuming for sake of argument that the defendant railroad companies had exceeded their powers in consummating the transactions authorized by the order of the Commission of May 16th, 1922, the plaintiffs have no right upon the basis of principles of equity to maintain this bill.

Appellants' Citations:

Counsel under (b) of 1, (p. 19) of their argument cite certain authorities stated by them to establish a principle contrary to that announced in the foregoing cases. An analysis of the same will show that they are either irrelevant to the issue or are in harmony with the cases heretofore cited. They rely upon paragraph 20 of Section 1 of the Act, which provides that:

> "Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest;"

It should first be said that there is no corresponding provision applicable to paragraph (2) of Section 5. Aside from this, however, the above quoted provision obviously covers cases only where a carrier undertakes,

without making application to the Commission, under paragraphs (18) and (19), to construct, operate or abandon railroad property where a prerequisite to the right so to do requires the approval of the Commission. Paragraph (20) was not intended to cover a case where compliance was had in every respect with paragraphs (18) and (19), and the question raised is as to the jurisdiction of the Commission to issue a certificate of convenience and necessity.

The case relied upon by counsel applying paragraph (20) above referred to, namely, the *D. & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 Fed. Rep. 540, was one in which the carrier enjoined attempted to construct a branch track without the consent of the Commission upon the theory that it was a spur track excepted from the jurisdiction of the Commission under paragraph 22 of Section 1.

The cases of *Peavey & Company* v. *Union Pacific R. Co.*, 176 Fed. Rep. 409, *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, *Edward Hines, Yellow Pine Trustees et al.* v. *U. S.* No. 91 decided by this court on November 12, 1923, *Atlantic Coast Line R. Co.* v. *Interstate Commerce Commission*, 194 Fed. Rep. 449 and *McLean Lumber Company* v. *United States*, 237 Fed. Rep. 460, are cited and reviewed under previous Subdivision 4 of this brief.

The cases of *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443 and *American Steel Foundries* v. *Tri-City Central Trades Council, et al.*, 257 U. S. 184, are so-called Clayton Act cases passing upon the right of employers to have injunctive relief against combinations of employees who interfere with their business in violation

of the provisions of the Anti Trust Laws. These cases are obviously not in point, for they represent instances of proceedings in equity to restrain the commission of injuries which at common law were actionable and under our Anti Trust Laws have become so by statute.

Furthermore, note in this connection the proviso contained in Section 16 of the Clayton Act, 38 U. S. Stat. at L. 737 (Section giving any person, firm, corporation or association the right to sue for injunctive relief against threatened loss or damage by violation of Anti Trust Laws) providing:

> "That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

The case of *International Railway Co.* v. *Davidson*, 257 U. S. 506, held that not only the users of a toll bridge, but also the Bridge Company itself was vitally interested in an attempt by the Collector of customs to demand extra compensation for Custom officers employed at the American end of the toll bridge on Sundays or Holidays to examine baggage.

Counsel cite a series of cases holding that owners of special franchises (exclusive and non-exclusive instances) may enjoin invasion of the property rights represented by the same by parties engaging in rival activities with-

out sanction of or contrary to law. The chief of these cases is that of *Memphis Street Railway Co.* v. *Rapid Transit Company*, 179 Southwestern Reporter 635. In this case the Supreme Court of Tennessee held that the Memphis Street Railway Company had the right to enjoin, for the purpose of protecting its franchise to operate cars in the streets of Memphis, the Rapid Transit Company from operating jitney busses without an ordinance from the City as required by the laws of the State. The court held that the defendants were lawbreakers, subject to criminal prosecution, operating in direct violation of the statute of the State, and, furthermore, that they might be enjoined as constituting a nuisance interfering with the operation of the plaintiff's cars. Note, however, the distinction made in this case which harmonizes it with the Ellerman Case and other cases upon which we rely. The Court said:

> "nor could the validity of a license or franchise possessed by a competing defendant be questioned, and its exercise restrained, in proceedings of this character. *Geneva-Seneca Electric Co.* v. *Economic Power & Const. Co.*, 136 App. Div. 219, 120 N. Y. Supp. 926; *Coffeyville Min. & Gas Co.* v. *Citizens' Natural Gas & Min. Co.*, 55 Kan. 173, 40 Pac. 326; *Market St. Ry. Co.* v. *Pen. Ry. Co.*, 51 Cal. 583. We are in full accord with the views expressed in these and like cases. Questions upon the regularity of a charter the validity of a franchise, and the like, are to be determined upon suit of the Attorney General or other constituted authority, and *not on suit of a competing corporation.*" (Italics ours.)

In *Bartlesville Electric Light & Power Co.* v. *Bartlesville Interurban Railway Co.*, 29 L. R. A. (N. S.) 77 (109 Pac. 228) the same distinguishing factor exists, that is to say, the defendant without authority from the City was trespassing upon City streets in an attempt to erect poles and wires for electric light service, and in accordance with the statement of the court was guilty of a public nuisance which invaded the property rights of the plaintiff.

Referring to the earlier cases cited by counsel *Conway* v. *Taylor*, 66 U. S. 603 (decided 1861) involved the invasion of an exclusive franchise to operate a ferry across the Ohio River; the *Slaughter House Cases*, 16 Wallace 36, (decided 1872) involved the question of the constitutionality of granting an exclusive and monopolistic franchise to operate slaughter houses in the City of New Orleans; *Town of East Hartford* v. *Hartford Bridge Company*, 10 Howard 511, (decided 1850) involved the invasion of a Bridge Company franchise by the town in operating a ferry over the Connecticut River without legal authority; and *Raritan & Delaware Bay Railroad Co. et al.* v. *Delaware & Raritan Canal, et al.*, 18 N. J. Equity 546 (decided 1867) involved the invasion of a franchise given by the State of New Jersey to a railroad company, which made it unlawful before the first day of January, 1869, to construct any other railroad or railroads in the State of New Jersey without the consent of the said complainants (owners of the franchise) which should be used for the transportation of passengers or merchandise between the Cities of New York and Philadelphia, or to compete in business between said cities with the railroads of the complainants.

Therefore none of such cases is in point in the present discussion.

Furthermore, in the New Jersey case attention was called by the court to the fact that the defendants were not claiming a statutable right to set up a line of railroad to compete with the chartered rights of the complainants, and that, on the contrary, there is no pretense that the state has yielded her assent to any such competing enterprise. The court thereupon said:

> "The controversy in this case, therefore, is between the complainants and mere wrong-doers, and the question thence arises, has a railroad company any redress against a competition unwarranted by law, and which materially affects the value of the privileges with which it is legally vested? (p. 570) * * * A competing road, set up without a legislative license, is a fraud upon such grant (franchise) and is a plain public nuisance. The consequence is, that the case of the complainants, in my opinion, does not, necessarily, rest upon the express clause in their charter guaranteeing to them an exclusive privilege" (p. 572).

It thus appears that the same distinction was made in 1867 as that heretofore referred to made by the court in *Memphis Street Railway Company* v. *Rapid Transit Company.*

Brooklyn City Railroad Company v. *Whalen,* 191 Appellate Division 737 (New York) falls in the class of the Memphis Street Railway Company case, for in that case the City, without any pretense of power or authority of law, was undertaking to operate a stage line

running over the routes and paralleling the tracks of the Street Railway Company, thereby subjecting it to special injury and added obstruction in the operation of its cars under its franchise.

The cases of *People Ex rel., N. Y. C. & H. R. Co.* v. *Public Service Commission*, 195 New York 157, and *People Ex rel. N. Y. Edison Company* v. *Wilcox*, 207 New York 86, are not in point because in those cases the courts could be called upon to review in certain respects the Commission's certificate of convenience and necessity, their jurisdiction being invoked by virtue of a statutory writ of certiorari. In this respect it was said in the Wilcox case:

> "The commission might legally and justly permit it (the relator) to become a party to the proceeding and the determination adverse to it after its intervention was reviewable, under certiorari, upon its application as the party aggrieved thereby." (p. 95.)
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> * * * * * * *
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> "In respect of any matter within the scope of the intervention, it became an actor, with liberty to present its contention and obtain an adjudication, and a consequent right to have whatever was done reviewed by the appellate courts." (p. 96.)

In the railroad case above referred to, the Court said:

> "It is also insisted by the appellant that the relator was not a party aggrieved by the action of the board of railroad commissioners. That was a question for the board and the Appellate Division to consider." (p. 166.)

It should be noted also that in the Whalen case above referred to the court called attention to the absence of a

certificate of convenience and necessity, and, upon any application for such certificate, to the legal right of the plaintiff to be heard.

In the instant case the plaintiffs make no charge that the New York Central has assumed control of the Junction properties without franchise or color of legal authority. Indeed the plaintiffs expressly concede by bringing their action under the provisions of Chapter 32 of the Urgent Deficiency Appropriations Act that they are seeking to try out the validity of the license issued to the New York Central pursuant to law, and, on the other hand, they make no claim of the invasion of the property rights of a special franchise. They appear only as competitors of the New York Central and in this capacity seek to initiate against it what amounts to a *quo warranto* proceeding. Every case referring to the subject cited in this brief and the brief for appellants follows the rule announced by this court in the Ellerman case that in such a question they have no interest and cannot be heard to complain.

II.

The provisions of the Commerce Court Act as applied to the District Courts could not constitutionally authorize such courts to review orders of the Interstate Commerce Commission except as may be so required to pronounce judgment in cases and controversies as provided in the constitution.

If it be contended by the plaintiffs that the proviso in Section 5 of the Commerce Court Act which authorizes

any party or parties in interest to the proceeding before the Commission in which an order or requirement is made to appear as parties of their own motion and as of right in any suit involving the validity of such order or requirement and the interest of such party is to be interpreted as permitting a suit in equity to be initiated by any party who appeared in the proceeding before the Commission without respect to seeking to prevent the invasion because of the order of the Commission of a right or interest entitled to protection at law or equity, such an interpretation would make the proviso of Section 5 unconstitutional. It would mean, in effect, authorizing a citizen who had disclosed before the Commission no possible invasion of his own legal rights or of rights of individuals, whom he was authorized to represent as agent, to institute a proceeding in court to test the validity of the order of the Commission as such and without respect to its application to a specific controversy. A proceeding thus brought would not be a judicial proceeding within the meaning of the Constitution of the United States to be adjudicated by the courts of the United States and would thus be beyond their powers to entertain. The interest of the party in the proceeding before the Commission must be of such a character as to identify him with a right cognizable at law or equity which the order of the Commission will invade, and for the protection of which the common or statute law has provided a remedy.

The case of *Muskrat* v. *United States*, 219 U. S. 346, involved the validity of an act of Congress authorizing David Muskrat and J. Henry Dick on their own behalf and on behalf of all Cherokee citizens to institute suits in the Court of Claims to determine the validity of cer-

tain acts of Congress which attempted to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands to the Cherokee citizens. A right of appeal from any decision of the Court of Claims was given to the Supreme Court of the United States.

Proceedings were begun in the Court of Claims based upon this statute and upon its decision an appeal was taken to this Court. This Court questioned whether the proceeding amounted to a case or controversy within the jurisdiction of the court to adjudicate because there appeared to be absent from it the claim of some specific right upon which the statutes, the validity of which was raised, reacted. The court first reviews the earlier decisions, discussing the division of the Government into three distinct and independent branches, of which the judicial branch was one and which held that administrative or advisory functions could not be constitutionally delegated to the United States Courts. It then proceeds to discuss what is meant by the judicial power conferred by the constitution upon the Supreme Court and with appropriate aid upon the inferior courts of the United States. In this respect it says:

> " 'Judicial power,' says Mr. Justice Miller in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' Miller on the Constitution, 314.
>
> As we have already seen by the express terms of the Constitution, the exercise of the Judicial power is limited to 'cases' and 'controversies'. Beyond this it does not extend, and unless it is

asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'? A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury* v. *Madison*, 1 Cranch, 137, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy'? That question was dealt with by Mr. Justice Field, at the circuit, in the case of In re *Pacific Railway Commission*, 32 Fed. Rep. 241, 255. Of these terms that learned Justice said:

'The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall. 431, 432; 1 Tuck. Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom *for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.* Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose *contentions* are submitted to the court for adjudication.' "

The Court quotes from *Marbury* v. *Madison*, 1 Cranch, 137, in which case Chief Justice Marshall said "that power [the judicial] is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law." It calls attention to the fact that (*Cohens* v. *Virginia*, 6 Wheat. 264) Chief Justice Marshall said—

> "The article does not extend the judicial power to every violation of the Constitution which may possibly take place, *but to 'a case in law or equity' in which a right under such law is asserted in a court of justice.*"

The court quotes Mr. Justice Brewer's opinion in *Chicago & Grand Trunk Railway Company* v. *Wellman*, 143 U. S. 339, to the following effect:

> "Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. *It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals.*"

In holding that the Supreme Court had no jurisdiction over the proceeding instituted the court said:

> "That judicial power, as we have seen, is the right to determine actual controversies arising be-

> tween adverse litigants, duly instituted in courts of proper jurisdiction."

and again

> "It is true the United States is made a defendant to this action, *but it has no interest adverse to the claimants.* The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question." (In foregoing quotations italics ours.)

The foregoing quotations make it clear that a party who seeks the adjudication of a Federal Court in respect of the application of a Federal statute or of an order of an administrative body, such as the Interstate Commerce Commission, to rights in general and not to rights specific, vested in him, and which he claims have been invaded, is not presenting to the court a case or controversy within its power to adjudicate.

The last case on this subject is *Keller et al.*, v. *Potomac Electric Power Company, et al.*, 261 U. S. 428, decided by this court, April 9th, 1923. This case involved the constitutional power of this court to review, pursuant to authority given it by act of Congress, the decisions of the Supreme Court of the District of Columbia ren-

dered in cases in equity upon issues of fact involving the valuation of the properties of public utility companies operating in the District of Columbia. The court held that such an inquisition did not involve a controversy over which it had jurisdiction within the meaning of the provisions of the Constitution. In this respect the court said:

> "Such legislative or administrative jurisdiction, it is well settled cannot be conferred on this Court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the Court in *Muskrat* v. *United States*, 219 U. S. 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this Court and of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this Court without real parties or a real case, or to administrative or legislative issues or controversies."

While this case is not analogous in its facts to the instant case the principle announced has application to a contention that a party who appeared in the proceeding before the Interstate Commerce Commission is thereby given a credential under Section 5 of the Commerce Court Act merely because of such appearance to begin a suit in

equity to set aside the order of the Interstate Commerce Commission without disclosing that the order when complied with has or will have a necessary reaction upon some right or interest either of the party or of some one for whom he is authorized to act which is entitled to protection in a court of law or equity.

The plaintiffs made no showing at the hearing before the Interstate Commerce Commission that any order that might be entered by it based upon the application of The New York Central Railroad Company would invade rights or interests peculiar to them for which they were entitled to demand protection in the courts. Upon this point being made by counsel for the applicant at the hearing before the representatives of the Commission the reply was made that any citizen had the right to appear before the Commission as an administrative body for the purpose of showing the needs of, and endeavoring to protect the public interest. Thereafter counsel for the intervening carriers made much of his position and that of his clients as appearing as citizens in the public interest. It is obvious, however, that neither he nor the plaintiffs can come to this court in any such capacity, for so to do would be to bring to it an issue identical in principle with that adjudicated in *Muskrat* v. *United States, supra,* to be not in fact a case or controversy within the jurisdiction of the Federal courts to consider.

III.

The allegations of the bill that the record made before the Commission upon which the said order is based contains no evidence that the present or future public convenience and necessity require or will require the consummation of the transactions authorized or that they will be in the public interest, are not sufficient to show that the Commission was without power to enter said order, or that it was otherwise invalid.

It should first be said that the allegations contained in Subdivision X of the bill, that the order contains no certificate of public convenience and necessity and no evidence in support thereof, may be ignored, as it is obvious from the form of the order of the Commission that it followed the requirements of paragraph (2) of Section 5 of the Interstate Commerce Act and not those of paragraph (18) of Section 1 of the same.

Paragraph (2) of Section 5 provides that:

> "Whenever the Commission is of opinion, after hearing, upon application * * * that the acquisition, to the extent indicated by the Commission, * * * will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

The report of the Commission follows both the spirit and letter of this paragraph in finding that subject to

the observance of certain conditions the acquisitions proposed "will be in the public interest."

The formal order likewise follows the requirements of the paragraph by approving and authorizing the acquisitions.

The bill and its exhibits taken together show that the averments to the effect that the record contains no evidence in support of the order must be given the meaning not that no evidence whatever exists to support the findings contained in the report of the Commission, upon which its formal order is based, but rather that the ultimate conclusions of the Commission are deduced from conflicting evidence. Each allegation in the bill stating that the record contains no evidence that the consummation of the proposed transaction will be in the public interest is followed by the statement:

> "but, on the contrary, the said record contains evidence, which clearly shows that the said acquisition of control is and will be directly contrary to the public interest and to a sound public policy."

Here is an obvious admission that evidentiary facts of some character pertinent to each issue were offered at the hearings although alleged to show conclusions contrary to those found by the Commission. Such statement must be read in conjunction with the averment made in Subdivision VII of the bill, that at the first hearing in the proceeding the plaintiffs intervened and were made parties thereto, and thereafter extensive public hearings were held, and in connection with the report of the Commission filed as an exhibit by the plaintiffs in behalf of

their own case summarizing the respective contentions of the parties and the evidence on the issues offered at the hearing.

Such report (Record 16) begins the review of the record by stating that it is voluminous and establishes the following facts. Thereafter is set forth in the most meticulous detail not a series of conclusions but an elaborately summarized statement of the evidence pertinent in the fullest degree to the points upon which the applicant relied for the support of its application. Thereafter the report summarizes the grounds specified in the application and the opposing contentions of the interveners, and comments upon the evidence in respect of such contentions; and after this full recital of evidentiary details it sets forth its several ultimate conclusions upon which it makes its finding that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest.

In the face of such a statement of facts a sweeping allegation that there is no evidence in the record to support the finding of public interest is not sufficiently definite to be good pleading. It can only mean that the plaintiffs do not agree with the conclusion reached by the Commission upon the evidentiary facts, a question of course that the courts cannot consider.

For the purposes of this argument we are entitled to take the plaintiffs' exhibits at their face value. It was their privilege to traverse in their bill the specific statements of the report summarizing the facts contained in the record. Their failure to do so, makes obvious that

their general allegations as to a want of evidence to support the findings means only that the weight of the evidence is against the findings. In the case of *Interstate Commerce Commission* v. *L. & N. Railroad*, 227 U. S. 88, this court, after analyzing the evidence contained in the record before the Commission, held that the Commerce Court was unwarranted in deciding that the order of the Commission was void because there was no material evidence to support it. This court in reversing the Commerce Court said:

> "The order of the Commission, restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary but sustained by substantial, though conflicting evidence. The courts cannot settle the conflict nor put their judgment against that of the rate-making body, and the decree is *Reversed.*"

However, beyond the above proposition is the further one that in the application of The New York Central Railroad Company the Railroad Company and the Commission were the only legally interested parties. The principle announced in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, *supra*, that an order will be void if a hearing was denied or if the finding was contrary to the indisputable character of the evidence, is, of course, only applicable in those cases in which the complaining party is entitled to be notified and heard. Though it be true that administrative boards and officers acting as agents of the Legislature, or in a quasi-judicial capacity, are not limited in

jurisdiction as to parties, and that all citizens without respect to their personal interests in the subject matters of investigation may appear before such bodies to offer evidence in the public interest; still only those parties whose legal rights will be affected by the order of the Commission are entitled to notice of the hearing (unless otherwise provided by statute) with the consequent right that any order affecting their interests shall not be arbitrarily made. The plaintiffs were not of this class, for they certainly would have had no standing in court to ask to have the permissive order of the Commission set aside, if it had been entered upon a hearing had without special notice to them and without their knowledge.

The case heretofore cited of *United States* v. *Merchants and Manufacturers Traffic Association*, 242 U. S. 178, is directly in point on the above proposition. The order of the Commission considered in that case was a permissive one authorizing the carrier to make certain rates excepted from the application of the long and short haul clause of the Fourth section of the Interstate Commerce Act. The proviso in this section reads:

> "That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property;"

The power here given to the Commission is of the same nature as that delegated to it under paragraph (2) of Section 5.

A number of hearings upon the application of the carriers had been held by the Commission in which many shippers participated. An elaborate supplementary report was made by it on January 29th, 1915, and another on April 30th, 1915. The propriety of modifications in addition to those proposed by the carriers was shown, and a new plan for constructing "back haul" rates developed by the Commission was eventually embodied in an Amended Fourth Section Order No. 124 of April 30th, 1915, and adopted by the carriers in the tariffs filed thereunder. Thereupon the Merchants & Manufacturers Traffic Association and others, representing the shippers of certain cities, conceiving themselves aggrieved by the refusal to grant them the same rates as certain ports, and alleging that they had participated in whole or in part at hearings which preceded the entry of the last amended order, applied to the Commission for a rehearing, and when their application was denied, brought suit in the District Court to restrain the enforcement of the amended order, averring that they had been denied their day in court and had not been given an opportunity to show the unreasonableness thereof.

It was averred that "the order of April 30, 1915, *was without evidence, that petitioners have been denied the equal protection of the law and deprived of property without due process of law, to their irreparable damage.*"

There thus appeared a case in which the Commission had given permissive authority to the carriers to readjust their rate structure resulting in affecting the interests of certain shippers. The particular case in which the order was made was disposed of without notice to such shippers. In the bill in equity filed by them to

enjoin the enforcement of the order it is averred that the same was without evidence, and furthermore, that the petitioners had been denied the equal protection of the law and deprived of their property without due process of law to their irreparable damage.

The case as thus stated is far stronger than that of the plaintiffs in the instant case, who make no similar claim to invasion of their constitutional rights.

The District Court, sitting with three judges, took jurisdiction and held "that an order authorizing higher rates to these interior cities could not legally be entered unless there was an 'application' to the Commission by the carriers for that specific purpose and 'a hearing upon that particular application as in a special case'; that there had been no such application and hearing and that consequently the orders were void and the tariffs filed in pursuance thereof illegal." (*Merchants & Manufacturers Traffic Association* v. *United States*, 231 Fed. Rep. 292).

Upon appeal to this Court the decision thus made was reversed. The Court held that "It may be doubted whether application by the carrier is a prerequisite to the granting of relief"; and of the relations of the petitioners to the hearing and of their right to complain it says:

> "Unless formal application be an indispensable prerequisite to the exercise by the Commission of the power granted by the Fourth Section, its absence or a defect in it could be waived; and it would be waived by the filing of tariffs under the order entered. For the order is permissive merely. The carrier is the only necessary party to the proceeding under §4. The Commission represents

> the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them."

The court further held that such parties "mistook their remedy" and that "To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission;". In other words a party who is not entitled to notice of a hearing certainly is not in a position to claim that any order based upon the same is void because of being arbitrary for any reason as, for instance, a want of evidence to support the same.

If the rates made by the tariffs filed under the authority granted seemed to the petitioners unreasonable, or unjustly discriminatory the Court said that the Interstate Commerce Act afforded ample remedy. So in the instant case, if the defendant companies operating the Junction properties discriminate against the plaintiffs, contrary to the provisions of the Interstate Commerce Act, such act affords them an adequate remedy. They may always appeal to the Commission for relief, and they are not entitled to seek to have the courts nullify its administrative authority as they are now attempting to do.

Another illustration of the situation of the parties in the instant case is found in comparing the status of carrier, shipper and Interstate Commerce Commission in their respective relations in the making and altering of rates.

In *Interstate Commerce Commission* v. *Louisville & Nashville R. R., supra,* it is said:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order."

The prerogative to make the rate belongs, of course, in the first instance, to the carrier, for it is entitled to name the price of the transportation that it has for sale. It follows, that if in such case the Commission seeks to set the rate aside as being unreasonable its action will be arbitrary unless supported by evidence. In such case the carrier is the interested party whose property is being taken by the abrogation of the rate and the Commission represents the public.

If, however, the rates filed by the carrier are accepted and approved by the Commission the shipper could not take exception to the Commission's action in such case on the ground that it is not supported by evidence, for if he complain that his property is thereby being taken by the exaction of an unreasonably high rate the burden of proof is upon him to establish such proposition. This, in principle, was the exact ruling of the court in the instance of the Commission's permissive order relieving the carriers from the application of the provisions of the Fourth Section of the Act in the case of *United States* v. *Merchants and Manufacturers Traffic Association, supra.* If, in such case, a shipper cannot complain that a permissive order unsupported by

evidence is arbitrary, how much farther removed are the plaintiffs in the instant case from such a right, for they, unlike the shipper, made no claim in their day in court before the Commission, and they now make no claim before this court in their bill in equity that they will be denied the equal protection of the law or will be deprived of their property without due process of law.

It follows, therefore, that all of the averments in paragraphs (1) to (7), inclusive, of Subdivision X of the bill of complaint, relating to the want of certificates of convenience and necessity and the want of evidence to support the order and its findings, are, in view of the occasion of their assertion, without effect in showing that the order of the Commission is invalid.

IV.

The order of the Commission being a Legislative Act, permissive in character, its validity cannot be attacked upon the ground that it is not supported by evidence.

The principle developed in the previous Subdivison, as announced in the case of *United States* v. *Merchants and Manufacturers Traffic Association, supra.*, is apposite to the point here made. It is again offered for the purpose of showing its significance in another relationship.

The Judicial Department of the Government can interfere in the affairs of the Legislative or Executive Departments only when the officers or agents of the lat-

ter invade by their acts rights or interests which the Judicial Department is required to protect. It is for such reason that this court held in *I. C. C.* v. *L. & N. R. R., supra.*, that a finding of the Commission without evidence to support it is arbitrary, for, it is presupposed that upon the basis of the finding so made the Commission intends to make and enforce an arbitrary order. It follows that if the complexion of the Commission's activity be such that it cannot in and of itself be arbitrary in the sense of invading private rights or interests the reason for the court's statement disappears. Such will always be the case where the Commission acting as the legislative agent of Congress investigates and specifies instances in which privileges, licenses or grants extended by Congress shall have application.

Paragraph (2) of Section 5 and Section 20a of the Interstate Commerce Act (regulating the issue of securities) illustrate cases of such character. Under paragraph (2) all that is required is that the Commission shall be of opinion, after hearing, that the acquisition of control will be in the public interest. To such a hearing there can be no interested parties other than the applicant and the Commission, for the latter represents the public. All others that intervene must necessarily act as *amici curiae* in the interest of the public. The Commission could satisfy itself as to whether the acts for which authority was sought were in the public interest by an informal hearing. Evidence is usually required only in cases involving adverse parties. There being only one party to the proceeding for authority under paragraph (2) of Section 5 it would seem that it

was not necessary to present formal evidence. The requirement of a hearing is for the benefit of the applicant and is not equivalent to a requirement of presentation of evidence. Therefore, if the Commission act in such case its order cannot be attacked upon the ground of being arbitrary for want of evidence. Franchises, grants or licenses received from the government are not subject to attack because not supported by proof of their necessity.

A perfect illustration of the point is found in paragraph (6) of Section 20a of the Act, under which the Commission is given authority to regulate the issue of securities. Such paragraph reads:

> "Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such *representations* as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceeding. The Commission may hold *hearings, if it sees fit*, to enable it to determine its decision upon the application for authority." (Italics ours.)

It is to be noted from the foregoing that, while the State authorities are entitled to notice of the application and have the right to make before the Commission representations, the Commission is not required to hold hearings to enable it to determine its decision upon the application for authority.

In the case of *Miller* v. *United States,* 277 Fed. Rep. 98, Judge Hand speaking for three judges sitting as the District Court held that upon an application by a carrier for authority to issue securities under Section 20a the Commission need make only such investigation as it considers necessary. He said:

> "As for the alleged defect in the powers of the committees, it is irrelevant because the railway company's application is enough. *The investigation required of the Commission may* be informal. Whatever they think necessary, and no more."

The scope of the Commission's prerogative as above stated, is due to the fact that the Commission and Congress are one and the same in law in determining upon the occasion for the application of the Congressional enactment.

Until the development in this country of the application of statutes through the medium of public utility commissions the Legislature directly conferred the power or privilege upon the public utility after investigation through a legislative committee. Since, therefore, the Interstate Commerce Commission in granting a privilege conferred by Statute is acting only in a legislative capacity, there is no constitutional reason why the Commission if it acts within its delegated power should be required to base its action upon any thing more than would be required of the Legislature.

That which constitutes public interest or public convenience and necessity is a very elastic question. It is always to be deduced from a great variety of circumstances tangible and intangible. It is appropriate for

the Legislature to delegate to its agent the power to act for the Legislature in every such inquisition. To argue that the courts should review the conclusions of the legislative agent in such case is equivalent to insisting that the judiciary should take over the functions of the legisative branch of the Government. It goes without saying that this is beyond their power.

V.

The purchase by The New York Central Railroad Company of all of the capital stock of The Chicago River and Indiana Railroad Company and the leasing to such latter Company of the Railroad of The Chicago Junction Railway Company did not bring about a consolidation of either The New York Central Railroad Company and The Chicago River and Indiana Railroad Company, or of The Chicago River and Indiana Railroad Company and The Chicago Junction Railway Company, or of all three such Railroad Companies into a single system for ownership and operation. The Interstate Commerce Commission therefore had power under the provisions of paragraph (2) of Section 5 of the Interstate Commerce Act to approve and authorize the acquisition of control by The New York Central Railroad Company of said other Railroads by the means thus described.

The chief point made in the bill as developed in paragraphs 8, 9 and 10 of Subdivision X of the same is that the Commission was without authority by order to approve the acquisition of control by the New York Cen-

tral of the River Road and of the Junction Road by purchase of all of the capital stock of the River Road and by the leasing of the Junction properties to the River Road. This assertion is based upon the proposition that the Commission has not yet adopted a final plan under paragraphs (4) and (5) of Section 5 of the Interstate Commerce Act for consolidating the railway properties of the United States into a limited number of systems; that the acquisition of control by the Central in the manner above described will constitute the consolidation of the Central and the Junction into a single system for ownership and operation; that therefore the authority given by the Commission for this purpose is prematurely exercised, since consolidations to be authorized by the Commission must be in harmony with and in furtherance of the final plan of railroad consolidations to be announced by it under paragraph (5) of Section 5 of the Act.

Counsel in support of the above proposition argue (Point 8, a, brief p. 59) that the application filed with the Commission shows the purpose to make the Junction and River Road a part of the system known as the New York Central Lines, and they state in this respect that such railroads have been operated along with other carriers constituting the New York Central Lines under a common control and management as a single system. (Point 8, b.) They ignore, however, Condition 1 of the Report of the Commission, which reads: "The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located

in Chicago in order to preserve for the shipper the present direct access to the railroad officials." (Record 22.)

They also state in their brief, although there is no averment to such effect in the Bill that the Junction and River Roads were separate properties, separately owned, operated and managed. The bill (Record 3) and the return of the applicant to the questionnaire issued by the Interstate Commerce Commission (Record 101) and filed as an exhibit by the plaintiffs show that The Chicago Junction Railways and Union Stock Yards Company, a New Jersey Corporation, owned all the capital stock of the Junction Company and that such corporation and Richard Fitzgerald owned fifty per cent. each of the capital stock of the River Road, and that the applicant asked for authority from the Commission to enter into an agreement with The Chicago Junction Railways and Union Stock Yards Company to purchase all of the stock of the River Road and to cause a lease to be made to such latter company of the railroad properties of the Junction Company. It thus appears that the Junction and River Roads were at the time of the filing by the New York Central of its application with the Commission properties under a common control, which control was proposed to be transferred to the New York Central, but with the expectation, as eventually prescribed in the order of the Commission, that such commonly controlled properties should continue to be operated as a distinct entity.

1. INTERPRETATION OF PARAGRAPH (2) OF SECTION 5:

For convenient reference this paragraph is again quoted, viz:

> "(2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

It is averred in paragraph 8 of Subdivision X of the bill that the Commission under paragraph (2) of Section 5 is authorized to approve the acquisition by one carrier of control of another carrier either under lease or by purchase of stock, only when such control does not involve the consolidation of such carriers into a single system for ownership and operation.

It is then averred that the acquisition by the Central of the control of the River Road by the purchase of the capital stock of the River Road and acquisition by the River Road of control of the Junction by lease of its properties will constitute a consolidation of the Central,

the River Road and the Junction into a single system for ownership and operation.

It is also averred in paragraph 9 of Subdivision X that the acquisition by the River Road of the Junction properties under a lease for ninety-nine years, renewable in perpetuity at the option of the lessee, constitutes a consolidation of the properties of the River Road and of the Junction into one corporation for ownership, management and operation.

The statement above made interpreting paragraph (2) of Section 5 is erroneous, for it adds by implication a proviso to the paragraph that would contradict the context. Counsel would read the paragraph as if it stated that the Commission shall have authority to authorize the acquisition of control under lease or by purchase of stock provided that where any such transaction shall amount to a consolidation the Commission shall have no such authority. To so interpret its language is to contradict its phraseology as actually written.

The Commission is given authority to approve and authorize acquisition "by one of such carriers of the control of any other such carrier or carriers either *under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation.*"

This language obviously classifies control by lease or by the purchase of stock in one category and the consolidation of carriers into a single system for ownership and operation in another category.

The language of the paragraph in this respect is not open to any suggestion of ambiguity, for the alternative phrase "or in any other manner not involving the con-

solidation" etc. following the specified instances of control by lease and control by purchase of stock is the declaration of a legislative intent that such instances shall in no case be regarded as amounting to a consolidation of properties into a single system for ownership and operation.

Counsel in their brief construe the paragraph by requiring the phrase "not involving the consolidation, etc." to limit the words "either under a lease or by the purchase of stock" as well as the words "in any other manner". To so construe the language would call for a comma after the word "manner" and would obviously make superfluous the recital of the specific instances of control by lease and by purchase of stock; that is to say, it would be sufficient under the forced construction thus given to the language of the paragraph if it read that the Commission may authorize acquisition "by one of such carriers of the control of any other such carrier or carriers * * * in any * * * manner not involving the consolidation of such carriers into a single system for ownership and operation." Why use the phrases "under a lease" or "by the purchase of stock" if they are not to be regarded as illustrating instances not involving a consolidation? All words of a statute are presumed to have significance and if possible none is to be regarded as superfluous.

2. Interpretation of the Term Consolidation as used in Paragraphs (4), (5), (6) and (7) of Section 5:

The interpretation that we give to paragraph (2) of Section 5 makes it harmonize with the term consolida-

tion as it is used subsequently in paragraphs (4), (5) and (6) of the Section, where reference is made to consolidation of properties into one corporation for the *ownership*, management, and operation of the properties theretofore in separate ownership, management, and operation.

In other words, the act uses the term consolidation in its true sense as known to the law and as distinguished from other forms of tenure as by lease or stock control.

Paragraph (6) defines very clearly what is meant by consolidation where it states that:

> "It shall be lawful for two or more carriers by railroad * * * to consolidate their properties or any part thereof, *into one corporation* for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation,".

One of the conditions is that the proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5), and paragraph (7) refers to the existing consolidation of four Express Companies into The American Railway Express Company. In that case the four companies had actually been consolidated by transferring their properties to a new corporation. Therefore when in paragraph (2) the Commission is given authority to approve a lease or the acquisition of stock or some other form of control "not involving the consolidation of such carriers into a single system for ownership and operation," the consolidation referred to is clearly the one thereafter mentioned in paragraph (6), namely, the wiping out of

the old corporations and the substituting therefor of a new consolidated corporation, or the merging of titles and franchises into a single ownership in one existing corporation. The *sine qua non* of the status so contemplated is a common tenure in fee for all of the properties vested in a single corporate title holder.

> "Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and where its meaning in one instance is clear this meaning will be attached to it elsewhere, unless it clearly appears from the whole statute that it was the intention of the legislature to use it in a different sense" (36 Cyc. 1132).

It thus clearly appears from the statute itself that in order to effect a "consolidation", as the word is used in the statute, a *single corporation* must be created or exist which shall *own* as well as operate all the property.

This use of the word "consolidation" is in accordance with its well established meaning.

In Thompson on Corporations, Second Edition, Volume 5, Section 6035, it is said:

> "Consolidation takes place where two or more existing corporations are consolidated into a single corporation, and the existence of the uniting corporations is terminated and the consolidated company succeeds in a general way to the rights and franchises and acquires the property and assumes the obligations and liabilities of all the constituent companies. In the ordinary legal phraseology the term 'consolidation' is generally used to indicate both the act and the result of uniting two or more corporations into one."

In Sections 6036 and 6037 in the same work attention is called to the distinction between an amalgamation and a consolidation and between a merger and a consolidation.

In Section 6040, it is said:

> "*What constitutes consolidation.*—Consolidation is the union or combination of the stock, property or franchises of two or more corporations and by which the property, franchises and privileges of one or of all, become the property, rights and franchises of a single corporation, and by which the conduct of the corporate enterprise of all the constituent corporations are placed under one management. 'When the rights, *franchises*, and effects of two or more corporations are, by legal authority and agreement of the parties, combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is in law, and according to common understanding a consolidation of such companies.' 'There seems to be a great confusion as to the differences between consolidation and merger and sale. Rightly understood, there never can be a consolidation of corporations, except where all the constituent companies cease to exist as separate corporations, and a new corporation, to wit, the consolidated corporation, comes into being.' Generally the effect of consolidation in strict legal parlance is that the consolidating corporations are dissolved and cease to exist, except, perhaps, for certain purposes, and a new and distinct corporation is created by the consolidation, with the combined rights, franchises, privileges and property of all the consolidating corporations."

To the same effect, see also—

14-A *Corpus Juris*, 1054.

Fletcher, Cyclopedia Corporations, Vol. 7, Sec. 4661.

In *Louisville, &c. Railroad Co.* v. *Louisville Trust Co.*, 174 U. S. 552, this Court held that an acquisition by one railroad company of three-fourths of the stock of another is not a consolidation within the meaning of a statute of Indiana authorizing one railroad company to consolidate with another. See page 568 of the opinion.

In *Mills* v. *Central Railroad Company*, 2 Atl. (N. J.) 453, the Chancellor said in the course of his opinion (p. 456):

> "But I am of the opinion that power to consolidate does not involve authority to lease, and that it does not enlarge the power to convey lands, etc., conferred by the charter. Power to consolidate is power to take in a partner, or to go in as a partner, while power to lease is power to dispose of the whole concern to a stranger. In a consolidation the stockholders of the respective companies still retain, to a certain extent, control of their corporate property; but by a lease the stockholders of the leasing company part with the control of their corporate property, and hand it over to others and abandon their enterprise."

So in *Archer* v. *Terre Haute, etc. R. Co.*, 102 Ill. 493, where the question was whether a certain agreement between two roads constituted a consolidation, the Supreme Court of Illinois said (p. 503):

> "The agreement of February 10, 1868, was not for the consolidation of the roads of the companies

signing it. Both corporations retained their separate existence, and it does not appear it was ever contemplated the two roads should be merged into one, and both corporations pass to one management. The very terms of the agreement are inconsistent with the idea of consolidation."

There is an elaborate discussion of this question by Judge Hunt, now United States Circuit Judge, when a member of the Supreme Court of Montana in *State* v. *Montana Ry.*, 45 L. R. A. 271, 53 Pac. 623, in which with copious citations of authorities he points out the difference between a lease and a consolidation.

An instructive case is that of *Gere* v. *New York Central & Hudson River Railroad Company*, 19 Abb. N. C. 193. Certain stockholders of the New York Central brought an action against that corporation and the New York, West Shore & Buffalo Railroad Company to restrain the consummation of a lease between such railroad companies. The New York, West Shore & Buffalo was a competing road in all respects for its entire length. It attempted to lease its road, property and franchises to the New York Central for a term of 475 years. The statute of New York authorized any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter gave the use of the leased railroad in such manner as might be prescribed in the contract. The statute then contained these words:

"But nothing in this act contained shall authorize the road of any railroad corporation to be used by any other railroad corporation in a manner inconsistent with the provisions of the charter

> of the corporation whose railroad is to be used under such contract."

By Laws 1869, chap. 917, paragraph 9, railroad corporations were also authorized to consolidate and merge their capital stock, franchises, and property with the capital stock, franchises, and property of any other railroad, and it was further provided that:

> "no companies or corporations of this state whose railroads run on parallel or competing lines shall be authorized by this act to merge or consolidate."

The court first disposed of the question of power to lease by holding that it existed under the statutes referred to, and then discussed the prohibitory section above quoted in the following language:

> "The leasing of one railroad by another, whether for a longer or shorter period, is not a merger or consolidation. The term 'lease' implies the continued existence of the corporation, the lessor, with all its powers and functions, and all the rights incident to its creation; and it would be a gross misapplication of terms to hold that a leasing or contract for use by one railroad to another is a merger or consolidation of the two roads."

The Court therefore held that the proposed lease was not inhibited because of the statutory provision against consolidation.

Counsel in arguing, as they do in point (d) of 8 of their brief, (page 69) that "Consolidation is any form of union or combination whereby a single control is exercised over properties, each of which was theretofore sub-

ject to different control" fly in the face of paragraph (2) of Section 5, for its very purpose is addressed to making possible with the authority of the Commission acquisition by one carrier of control of another; and their own quotations conspicuously repudiate their point.

Thus they quote as apposite to their argument a large portion of the opinion of the Commission in the case entitled "*In the Matter of the Application of Pittsburgh & West Virginia Railway Company*", 70 I. C. C. 682 (decided December 10th, 1921), but they have failed to explain that the application to the Commission in this case was made under Section 20a for authority to issue the capital stock of the applicant to be used to acquire the stock of another railroad company in a plan to merge such other railroad company with the railroad of the applicant by the purchase of all of the former's franchises, corporate properties, rights and credits, and upon the understanding that the corporate existence of the merged railroad should be terminated.

This was obviously an instance of a form of consolidation controlled by the provisions of paragraphs (4), (5) and (6) of Section 5. The applicant carrier had invoked the jurisdiction of the Commission only under Section 20a to issue shares of stock, and the Commission denied the application because no authority had been sought from it to merge or consolidate the properties of the other carrier with those of the applicant. The opinion of the Commission was addressed not to an interpretation of the nature of the proposed acquisition, but to deciding that whatever its character there was necessity for obtaining the Commission's approval of the same. The Commission said that the meaning of the

word "consolidate" as used in paragraph (6) was of no immediate importance in its application to the subject matter of the case before them,—

> "for if the proposed purchase falls outside the terms of paragraph (6), it is certainly covered by paragraph (2) which deals with the acquisition by one carrier of the control of another 'either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation.' The question has a prospective importance, however, if we decide that authorization of the purchase is necessary under section 5, for no such authority may be granted under paragraph (6) until we have adopted a plan of consolidation under paragraphs (4) and (5), *while there is no similar limitation upon action under paragraph* (2)." (Italics ours.)

In other words the essence of the Commission's jurisdiction under paragraph (2) (under which it has immediate plenary powers of action) irrespective of the adoption by it of any plan of consolidation under paragraphs (4) and (5), is to authorize the unification of carriers under a form of control.

Again in the same case the Commission in insisting upon its jurisdiction over every form of proposed combination of carriers said:

> "Nor is the language of section 5 inconsistent with this conclusion. In *Lewis's Sutherland on Statutory Construction* it is said, at pages 1149-1150:
>
> > A direction contained in a statute, though couched in merely permissive language, will

> not be construed as leaving compliance optional, when the good sense of the entire enactment requires its provisions to be deemed compulsory.

But it is unnecessary to rely upon this principle of construction, for when, in paragraph (6), it is provided that 'it shall be lawful' to consolidate under certain conditions, this is but another way of saying that consolidations in disregard of those conditions shall be unlawful. *And in like manner, when it is provided in paragraph (2) that we may authorize the acquisition by one carrier of control of another in any manner falling short of consolidation, whenever we are of opinion that such acquisition 'will be in the public interest,' this is equivalent to saying that authority for the acquisition shall not exist under other conditions.*" (Italics ours.)

From the foregoing it would appear that counsel by means of their point (d) of 8, (Brief, p. 69) have endeavored to argue paragraph (2) of Section 5 entirely out of the statute.

3. Inconsistencies between Paragraph (2) of Section 5 and the remaining Paragraphs of the Section arising from the interpretation given to Paragraph (2) by Counsel for the Plaintiffs:

Reading paragraph (2) in connection with paragraphs (4) to (6) of Section 5 as amended, it is a proper inference that Congress intended to deal with all combinations of carriers, and did so by dividing them into two all-embracing classes, (a) combinations less than

consolidations, covered by paragraph (2), and (b) combinations constituting consolidations to be dealt with by paragraphs (4), (5) and (6). If different meanings be given to the term consolidation, the classification is not complete. There would be control by lease and/or purchase of stock which would be excluded from paragraph (2) and not included in paragraphs (4) to (6), for such paragraphs are obviously limited to consolidations effecting a unification of corporate franchises "into one corporation for * * * ownership". Furthermore if paragraph (2) is to be interpreted as recognizing some instances of control by lease or control by the purchase of stock, which would amount to a consolidation, great confusion would result in its application. The Commission would be confronted in each case with the question, does this lease and/or purchase of stock give the carrier a control over the other carrier, and, if so, does it amount to a consolidation? Thus there would develop in every instance a mixed question of law and fact for the Commission to pass upon with no guide other than as usually happens in all such problems the reactions of the Commission upon each specific set of facts. It is incredible to believe that Congress intended to create such an indefinite and vague situation.

The interpretation of counsel pushed to its logical conclusion would seem to result in making every lease and purchase of stock which gave one carrier a control over another amount to a consolidation, and hence be beyond the scope of paragraph (2); for every lease and purchase of stock which does not amount to a control is without the terms of paragraph (2). Hence there would be nothing left of the paragraph. This statement may be further demonstrated as follows:

To bring an application within the jurisdiction of the Commission the lease must cover all the lessor's property, for a lease of a part of the property will not give the lessee corporation control over the lessor corporation. And by parity of reasoning the stock to be acquired must be of an amount sufficient to confer control over the corporate activities of the other carrier. Application for an acquisition of control by lease or purchase of stock is not likely ever to be made except for the purpose of uniting the two carriers for operation as an entity or as operating parts of a single system. But according to the contention we are combating, this amounts to a consolidation. Hence when we have the "control" necessary to give the Commission jurisdiction, we will have a "consolidation" that will defeat the jurisdiction.

If counsel propose to save paragraph (2) of Section 5 for any purpose they have carefully refrained from giving any illustration under their theory of its interpretation falling within its terms. Their studied silence in this respect is argument most eloquent in evidence of the fallacy of their position.

Again, if operation in a single system by any form of tenure becomes the measure of consolidation, then the word "ownership" becomes superfluous as used in paragraph (2) and, also, in the phrase in paragraph (6) of the Section reading "into one corporation for the *ownership*, management, and operation of the properties theretofore in *separate ownership*, management, and operation," for in every instance of a lease of railroad property it invariably follows that the leased railroad is

united with the property of the lessee railroad for purposes of operation.

Counsel say "We find it impossible to harmonize the action of the Commission in the report and order here under attack with action which it has taken in other cases where applications were made under paragraph (2) of Section 5" (brief, p. 80).

The point so made is certainly well taken, for they will continue to find this want of harmony as long as they choose to ignore the intended significance of the word "ownership" above referred to as used in paragraph (2) in describing an attribute of the form of consolidation excepted from the provisions of such paragraph and as used in paragraph (6) in describing the form of consolidation controlled by its provisions, and as long as they insist in classifying every form of unified control of railroad properties without regard to whether it be accomplished by one carrier purchasing the stock or taking a lease of the properties of another carrier as outside of the provisions of paragraph (2).

Let us again use Counsel's own quotations to illustrate the fallacy of their position. They cite as apposite to their argument the case entitled "*Merger of Subsidiary Companies with Boston & Maine*", 76 I. C. C. 797. Here also they failed to explain that the applicant railroad company sought to merge into its corporation certain of its subsidiary companies by the acquisition and retirement of their respective capital stocks and the cancellation of their franchises, thus uniting "into one corporation for the *ownership*, management, and operation of the properties theretofore in separate ownership, management, and operation".

The Commission in such case well said:

> "The contemplated mergers would involve the consolidation of the applicant and the subsidiary companies into a single system for *ownership and operation* and, therefore, we are without jurisdiction under that paragraph to approve or authorize the same."

Upon the basis of this conclusion it said that if the application be treated as having been filed under paragraph (2) of Section 5 the Commission was without jurisdiction under that paragraph to approve and authorize the same, and if the application be considered as having been presented under paragraph (6) of said Section 5 the Commission could not entertain it at the present time.

Counsel have likewise misconceived the issue in the case from which they quote at length entitled "*In the Matter of the Application of the Western Pacific Railway Company for Authority to Acquire Control of the Sacramento Northern Railroad and to Purchase its Bonds*", 71 I. C. C. 653 (Rehearing July 2nd, 1923). Counsel quote in support of their position from a discussion of the Commission in this case as to whether the acquisition of all the capital stock of the Sacramento Northern by the Western Pacific would make the former an instrumentality of the latter and incorporate it, although separately operated, into its system, as if the Commission were to determine by the decision of this question whether it would have jurisdiction under paragraph (2) of Section 5 to authorize the Western Pacific so to acquire such stock.

So far from such being the case the Commission's conclusions upon the above subject have a significance as applied to the instant case directly contrary to that which counsel would attribute to them. The Western Pacific sought authority to acquire control of the Sacramento Northern *Railroad* by the purchase of all of the capital stock of the Sacramento Northern *Railway* Company, which in turn proposed to purchase the properties of and operate the Northern *Railroad*. It was urged against the application that until the *Railway* Company had applied to the Interstate Commerce Commission under Section 20a of the Act for authority to issue its own shares it would not be appropriate for the Commission to determine whether the Western Pacific should be given permission to acquire such shares. To this proposition it was answered by the Western Pacific that the Northern *Railroad*, which the Northern *Railway* Company proposed to purchase and operate, was an electric line not subject to the control of the Commission under the provisions of Section 20a of the Interstate Commerce Act respecting the issue of its securities.

The opinion of the Commission was addressed to demonstrating the contrary by showing that not only was the Sacramento Northern as independently operated a railroad of the character falling within the scope of the provisions of Section 20a, but that aside from this fact, upon acquisition of the control of the same by the Western Pacific under the provisions of paragraph (2) of Section 5 it would be undoubtedly so subject to the said Section "for it will be operated as part of the Western Pacific System, which is a general steam railroad system of transportation within the meaning of the Act".

In other words the Commission was taking for granted that the provisions of paragraph (2) of Section 5 covered a case of the uniting of railroads into a single operation system by means of stock control, for upon this assumption was based in part its conclusion that "the stock proposed to be acquired by the applicant would have no validity without (its) authority". That it was perfectly willing to take jurisdiction at the appropriate time of the application having for its object the uniting of the controlling and controlled carriers into a single system is apparent from the concluding statement of the opinion, reading:

> "The application will be denied without prejudice to its renewal later if the new Sacramento Northern Company should apply to us for authority to issue its securities and to assume the liability proposed."

Exactly consonant with this view is what the Commission said in the case of *Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508, also quoted by counsel.

> "It is not enough to constitute such a consolidation" (that is a type of control excepted from paragraph (2) of Section 5) "that the carriers or their properties be consolidated into a single system for operation, or for management, or for management and operation, but it must also appear that they are consolidated for ownership."

Counsel rely upon *East St. Louis Connecting Railway Company, et al.* v. *Jarvis*, 95 Fed. Rep. 735, decided by the Circuit Court of Appeals for the 7th Circuit, holding that a ten year lease by one railroad company of a paral-

lel and competing line amounted to a consolidation within the meaning of the constitutional provision of the State of Illinois prohibiting a railroad corporation from consolidating its stock, property or franchise with another railroad corporation owning a parallel or competing line; also upon the case of *L. & N. Railroad Co.* v. *Kentucky*, 161 U. S. 677, in which this court affirmed an opinion of the Court of Appeals of Kentucky holding unlawful because of a similar Kentucky constitutional provision a consolidation effected by the Louisville & Nashville between its line and certain other railroad lines in Kentucky through the purchase of the capital stock as well as the physical properties of such other lines.

The above mentioned cases are obviously not in point as the constitutional provisions intended to prohibit the unification of parallel and competing properties in any form for common operation; to make possible which situation under certain circumstances is, on the contrary, the very office of paragraph (2) of Section 5.

With like irrelevancy counsel cite and quote from *United States* v. *Southern Pacific*, 259 U. S. 214 and *Northern Securities Case*, 193 U. S. 197, having to do with the existence of combinations prohibited by the Sherman Anti-Trust Law.

Congress has given express recognition to the fact that under paragraph (2) of Section 5 the control therein authorized by one carrier of another could include not only system combinations but system combinations of parallel and competing lines denounced as unlawful under State or Federal Anti-Trust Laws, for paragraph (8) of Section 5 reads as follows:

> "The carriers affected by any order made under the foregoing provisions of this section" (and this includes paragraph (2)) "and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the 'anti-trust laws,' as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."

The foregoing expression of Congressional intent in and of itself is a complete answer to the whole of counsel's argument that "any form of union or combination whereby a single control is exercised over properties, each of which was theretofore subject to different control" is beyond the power of the Commission to sanction under paragraph (2).

The Interstate Commerce Commission and the Circuit Court of Appeals for the Eighth Circuit have passed upon this very question in the recent hearings before the Commission and that Court involving the application of the Southern Pacific Company to acquire control of the Central Pacific.

This court had held that the control by the Southern Pacific of the Central Pacific was in restraint of competition and in violation of the Sherman Anti-Trust Act as the law existed prior to the enactment of the Transportation Act (*United States* v. *Southern Pacific Com-*

pany, 259 U. S. 214) and had directed that a decree be entered severing the control by the Southern Pacific by stock ownership or by lease. Pursuant thereto a mandate was issued on October 17th, 1922 to the Circuit Court of Appeals for the Eighth Judicial Circuit directing that further proceedings be had in the cause in conformity with the opinion and decree of this court. The decision of the court as above stated was based upon the law as it existed prior to the enactment of the Transportation Act, 1920. On October 17th, 1922, the Southern Pacific Company filed an application with the Interstate Commerce Commission under paragraph (2) of Section 5 of the Interstate Commerce Act as amended by the Transportation Act, 1920, for authority to acquire control of the Central Pacific Railroad Company by lease and by ownership of all of its issued and outstanding capital stock. The Commission in its report authorizing the making of a lease in such case said:

> "The question has been raised as to whether an acquisition of control under the circumstances proposed amounts to a consolidation of the carriers concerned 'into a single system for ownership and operation,' as to which type of control we have no jurisdiction under paragraph (2) of Section 5. We have given consideration to the question and find that an acquisition of control consummated as proposed and exercised subject to the conditions to be imposed by our order herein, does not involve the consolidation of such carriers *into a single system for ownership* and operation. It is not enough to constitute such a consolidation that the carriers or their properties be consolidated into a single system for operation, or

> for management, or for management and operation, but it must also appear that they are consolidated *for ownership*. Since each of the carriers will retain its corporate identity and the legal title to its property, no consolidation of the kind defined by the statute will result" (76 I. C. C. 508). (Italics ours.)

The order of the Commission based upon its report provided, among other things, as follows:

> "It is ordered that acquisition by the Southern Pacific Company of control of the Central Pacific Railway by ownership of the capital stock of the Central Pacific Railway Company and under and in accordance with the terms of the proposed lease, as described in the application and report aforesaid be, and the same is hereby, approved and authorized."

After the entry of the order of the Commission the Government moved in the Circuit Court of Appeals that a final decree be entered in the case based upon the mandate issued from this Court. On June 18th, 1923, the Circuit Court of Appeals, after a full hearing, rendered a decision holding that the Interstate Commerce Commission had the authority to authorize and approve the control by lease and stock ownership of the Central Pacific Railroad by the Southern Pacific Company, and pursuant thereto it entered its decree reading in part as follows:

> PART 1. "4. The Transportation Act, 1920, conferred upon the Interstate Commerce Commission jurisdiction to entertain said application of the Southern Pacific Company and to make the aforesaid order of approval and authorization."

PART II. "2. The control of the Central Pacific Railway Company by the Southern Pacific Company through the said new lease approved and authorized by the Commission and through the ownership of stock, also authorized, is a lawful control. The prior unlawful control with which the mandatory requirements of the decision of the Supreme Court were intended to deal has now been succeeded by a situation and relation between the two railways which is lawful, and the executory and directory provisions of said mandate have thus been satisfied or rendered inoperative." (*United States* v. *Southern Pacific Company*, 290 Federal Reporter 443).

It thus appears that the Circuit Court of Appeals for the Eighth District has decided squarely against the interpretation given by the plaintiffs in the instant case to paragraph (2) of Section 5.

It is to be noted in the instant case that the stock control acquired by the Central over the River Road did not even result in producing between them a single operating entity, for Condition 1 of the Commission's report reads:

> "The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located in Chicago in order to preserve for the shipper the present direct access to the railroad officials" (Record 22).

The practical construction by the Interstate Commerce Commission of these clauses as above expressed in the Southern Pacific case and in other cases is entitled to great weight.

In *La Roque* v. *U. S.*, 239 U. S. 64, this court said:

> "Whether the Nelson Act contemplated that allotments should be made on behalf of Indians otherwise entitled thereto but who should die without selecting or receiving them is the principal question for decision. The regulations and decisions of the Secretary of the Interior, under whose supervision the act was to be administered, show that it was construed by that officer as confining the right of selection to living Indians and that he so instructed the alloting officers. While not conclusive, this construction given to the act in the course of its actual execution is entitled to great respect and ought not to be overruled without cogent and persuasive reasons. *United States* v. *Moore*, 95 U. S. 760, 763; *Hastings & Dakota R. R.* v. *Whitney*, 132 U. S. 357; *United States* v. *Hammers*, 221 U. S. 220, 225, 228; *Logan* v. *Davis*, 233 U. S. 613, 627."

There is a large number of cases in which this rule of practical construction is considered, cited in Rose's Notes under *United States* v. *Moore*, 95 U. S. 760.

The statute has been uniformly construed by the Interstate Commerce Commission in harmony with our contention.

In *Lease of Valley Terminal Railway Co.*, Finance Docket No. 1, 65 I. C. C. 105, the Commission clearly defined what is meant by "consolidation" as follows:

> "It seems evident that Congress had in mind a complete scheme of regulation of contracts or other arrangements whereby one common carrier subject to the Act might secure control of another such carrier, *either by consolidation into one cor-*

> *poration*, or in some manner not involving such consolidation, or whereby they might enter into an agreement for the pooling of freight or earnings with a competing railroad." (Italics ours.)

Likewise in *Control of Big Four by New York Central*, Finance Docket No. 2046, 72 I. C. C., 96, 98 the Commission said:

> "While the acquisition by one carrier of the capital of another carrier may constitute, in many cases, a step toward consolidation, we are not convinced that such a step may not be taken in advance of the adoption of our consolidation plan pursuant to paragraphs (4) and (5) of Section 5. Paragraph (2) of that section authorizes us to approve the acquisition of control in any manner 'not involving the consolidation of such carriers into a single system for ownership and operation.' It is clear that ownership by the applicant of all of the outstanding stock of the Big Four will not in any sense work such a consolidation. It was the undoubted purpose of paragraph (2) to permit transactions short of actual consolidation to be consummated without reference to the consolidation plan provided for in paragraphs (4), (5) and (6). So much is clearly indicated by the language above quoted."

In numerous cases where one carrier already owned or was acquiring all or substantially all the capital stock of a second carrier, the Commission has held that the additional acquisition of a lease from the second carrier did not effect a "consolidation" but might be permitted as an "acquisition of control" under paragraph (2) of Section 5.

Control of	*Length of Lease—Years.*
Valley Terminal Railway Company, 65 I. C. C., 105	2
Valley Terminal Railway Company, 76 I. C. C., 147	50
Chicago, Terre Haute & S. E. R. R. Co., 70 I. C. C., 20	999
New York, Philadelphia & Norfolk R. R. Co., 70 I. C. C., 299	999
Cumberland Valley & Martinsburg R. R., 70 I. C. C., 301	999
Perth Amboy & Woodbridge R. R. Co., 70 I. C. C., 303	949½
New York Bay Railroad Company, 70 I. C. C., 306	949½
California Southern R. R. Co., 70 I. C. C., 514	10
Chesapeake & Ohio Railway Co. of Indiana, 70 I. C. C., 694	999
Arizona & New Mexico Ry. Co., 70 I. C. C., 795	1 (and until notice of termination)
Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co. (Panhandle), 72 I. C. C., 128	999
Eldorado & Santa Fe Ry. Co., 72 I C. C., 229	9 Yrs. 11 Mos.
Toledo & Ohio Central Ry. Co. Kanawha & West Virginia R. R. Co. Zanesville & Western Ry. Co.	72 I. C. C., 243 — Corporate existence of lessor and renewals.

Control of	*Length of Lease—Years.*
Grand Rapids & Indiana Ry. Co., 72 I. C. C., 260	999
Virginian & Western Ry. Co., 72 I. C. C., 454	999
Wheeling Terminal Ry. Co. and others, 72 I. C. C., 674	999
Chicago, Memphis & Gulf Ry. Co., 76 I. C. C., 637	40
Chicago, St. Louis & New Orleans Ry., 76 I. C. C., 294	99
New York, Lake Erie & Western C. & R. R. Co., 71 I. C. C., 541	20
Rio Grande, El Paso & Sante Fe R. R., Finance Docket 2804, decided April 4, 1923	10
Control of Black Mountain R. R., Finance Docket 2852, decided May 5, 1923	Until terminated on notice.
Control of Dodge City & Cimarron Valley Ry., Finance Docket 2870, decided May 16, 1923	10 (and until terminated by notice).

In the following cases, a carrier which already owned a lease of a second carrier, was permitted to acquire either control in the first instance or further control of the capital stock of said second carrier, under Paragraph (2) of Section 5:

Evansville, Indianapolis & Terre Haute Ry. Co., 67 I. C. C., 513	3
Pittsburgh, Fort Wayne & Chicago Ry. Co., 67 I. C. C., 752	999

As appears from the foregoing discussion the Commission's construction of the statute is one that gives

to the word "consolidation" its ordinary legal significance, follows the rule that the same word is to be regarded as having been used in the same sense throughout the particular sections of the statute under review, and conforms to the general context.

The construction which has been placed upon the act by the body charged with its practical administration is also necessary in order to give it practical effect. It is a matter of common knowledge, and thus within the knowledge of Congress, that the most usual means of bringing about a unification of corporate interests short of an actual consolidation is through lease and stock ownership. We have cited in this section of the brief 24 cases in which, through the exercise of the Commission's jurisdiction under paragraph (2), control of one carrier by another through the combined means of lease and stock ownership has been perfected. In one other case *Control of Lake Erie & Western by Nickel Plate*, 72 I. C. C., 459, control by a somewhat novel and unusual form of operating agreement, but having substantially the same effect upon operation as would a lease, was authorized. We know of no other case where control authorized under this section and since its passage has been brought about except by lease, stock ownership, or both combined. It is manifest on its face that to withdraw from the jurisdiction of the Commission under paragraph (2) cases where the control sought is to be brought about by lease and stock ownership would be to render impossible that unification of common carrier properties short of an actual technical consolidation, which it seems to have been the evident purpose of Congress to authorize.

As stated in *LaRoque* v. *United States, supra,* a construction given to an act in the course of its actual execution by the administrative authorities charged therewith, while not conclusive, "is entitled to great respect and ought not to be overruled without cogent and persuasive reasons." It is respectfully submitted that there is an utter lack of cogent and persuasive reasons for the contention that the Commission has in this case, by its construction of the statute, usurped a jurisdiction not conferred. On the other hand, the construction given to the act by the Commission is supported by every canon of statutory construction and is consistent with the evident purpose of the statute.

In support of the statement made in the last sentence of the preceding paragraph we call attention to the two main objects to be accomplished by the paragraphs of the Transportation Act now under consideration. The plan of consolidation is essentially connected with the new statutory rule of rate-making prescribed in Section 15a, paragraph (2) of the Interstate Commerce Act, as amended by the Transportation Act. That scheme was to make rates for large territorial groups of railroads on such a level that with honest and efficient management the result for the territorial group would be an operating income yielding a certain per cent. of return on the aggregate value of the railroad properties in the group. By consolidating the railroad system in each of these large territorial groups into two or more enlarged systems of fairly equal earning power and financial strength Congress expected that under uniform rates substantially the same rate of return would be earned. Another purpose was to have the capitalization of each of the large

corporations resulting from the consolidation, the aggregate of its stocks and bonds, correspond to the valuation of its properties by the Federal Board of Valuation. Congress was evidently aiming at a solution of the railroad problem which would be stable and permanent. Now neither stability and permanence nor the desired relation between capitalization and valuation will be accomplished if consolidation is brought about by way of lease and/or stock ownership, because such method of consolidation avoids any recapitalization and is terminable at will by cancellation of lease or sale of stock.

In conclusion it should be said that it is not for the courts to take exception to an express legislative distinction segregating instances of acquisition by one carrier of the control of another carrier by lease without limitation as to the term of the lease, and/or by purchase of stock without limitation as to the amount of stock to be acquired, from instances representing the unification of the properties of two carriers in a form involving the consolidation of such carriers into a single system for ownership and operation.

With such legislative distinction it is not within the power of the courts to inquire whether a lease for 99 years and thereafter at the option of the lessee in perpetuity, or whether the purchase by one carrier of 100% of the capital stock of another carrier results in so-called practical consolidation.

There is a clear distinction in law between merging properties in a single tenure, as by uniting them in fee under one corporate franchise and bringing them together under the control of a single individual or corporation by a twofold tenure in which the holding of one

segment is distinct from that of the other segment; and as heretofore shown the foregoing is not only a theoretical distinction but also a practical one.

The merging of railroad properties into a single fee ownership vested in one corporation makes them thereafter a unit in this respect. Bringing them together in the twofold tenure of fee in part and lease in part leaves still in law two distinct units *owned* by two distinct parties. Congress has made this distinction in connection with its requirement that the Commission shall prepare and adopt a plan for the consolidation of railway properties.

Therefore the courts cannot legislate the distinction out of existence. The distinction certainly exists at law, and is also a very practical one, and it is for Congress alone to determine whether the same shall be recognized from the standpoint of delegating to the Commission the power by which in the one case it is authorized to permit the acquisition of control by carriers of each other's properties and in the other case the consolidation of such properties into one corporation for ownership, management, and operation.

VI.

The plaintiffs' right to equitable relief is barred because of their laches shown on the face of their bill.

The order of the Commission was entered on May 16th, 1922. The plaintiffs allege upon information and belief that immediately upon the publication of the deci-

sion, report and order of the Commission and prior to July 13th, 1922, the Central acquired control of the River Road by the purchase of the capital stock thereof; the River Road acquired control of the Junction properties by lease; and the Central and River Roads have continually operated the said railroad properties as an integral part of and for the benefit of the New York Central System of railroads.

Furthermore the plaintiffs necessarily knew of the acquisition of control above alleged, for they aver that it has resulted in a loss to them of competitive tonnage amounting in revenue to $10,000,000 annually.

The bill in equity and the report of the Commission attached as an exhibit to the bill show that the purchase price of the stock of the River Road was $750,000. and that the annual rental to be paid for the lease of the Junction properties was $2,000,000., payable in quarterly instalments of $500,000. each, at the expiration of each quarter year of the term, except that the first two installments were to be for $250,000. each.

The plaintiffs with knowledge of this situation have delayed almost a year before filing their bill seeking to have the order of the Commission annulled and the transactions consummated pursuant to its authority set aside and enjoined.

Such circumstance is evidence of laches on their part, for with full knowledge of what was to be expected upon the entry of the order of the Commission they have silently waited watching for a year the development of events that have made impossible the restoration of the *status quo*. They knew that the purchase price of the

stock was presumably paid upon the acquisition of the same by the Central, and they were bound to know that as soon as the lease was executed the quarterly rental payments were required to be made as specified in the lease. In calling attention to these facts it is to be remembered that the capital stock of the River Road was purchased and the lease of the Junction properties was made to the River Road under color of authority derived from a Government body. The complaint of the bill is not that the Commission was unauthorized by statute to make orders of authorization and approval of the character of that entered by it on May 16th, 1922, but that the facts show that the Commission's authorization in such case was defective. The defendant railroad companies were therefore entitled to proceed without criticism under Government sanction presumably valid. It has been held that even a state, having delayed without a word of protest or remonstrance until a party acting upon a not unreasonable construction of a public grant has expended a large sum of money in the construction of a public work in the confidence that it possessed all requisite legislative authority, will be refused the aid of a court of equity to attack the validity of its grant. The following cases so hold:

Commonwealth v. *Phila. B. & B. M. Tpk. Co.*, 153 Pennsylvania 47 (25 Atl. Rep. 1105).

State v. *Janesville Water Power Co.*, 92 Wisconsin 496 (66 N. W. 512).

United States v. *Willamette V. & C. M. W. R. Co.*, 54 Fed. Rep. 807.

People v. *Pullman Palace Car Co.*, 175 Illinois 125.

If the state would be estopped under the circumstances above referred to how much more true it is that private parties guilty of a similar neglect would be barred from questioning the existence of the franchise or license derived from the state. It is a familiar rule of equity that equity aids the vigilant and not the sleepy. If the order of the Commission, made May 16th, 1922, violates any rights of the plaintiffs they knew this fact at the time the order was entered. The wrong complained of is that the Commission's order has resulted in depriving and in continuing to deprive them of business. They appeared before the Commission and urged their rights, and notwithstanding that the Commission denied their asserted rights, they stood by and allowed the order of the Commission to be carried out. They made no effort to seek relief in the courts until almost a year after the entry of the order, knowing that large sums of money were being, or would be, spent on the faith of the order. They failed to notify the defendant railroad companies that they would seek relief from the order of the Commission, or that they would, if the defendants acted under its order seek the aid of a court of equity to set aside any acts taken in pursuance of the same.

Under the facts thus disclosed by the Bill of Complaint the plaintiffs were obviously required to act promptly if they were to be entitled to act at all.

In *Sullivan* v. *Portland etc. R. R. Co.* 94 U. S. 806, at page 811, it is said:

> "Every case is governed chiefly by its own circumstances; sometimes the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the statute is re-

quired; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statuable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence and to decide accordingly."

To the same effect is *Galliher* v. *Cadwell*, 145 U. S 368. In this case the court, after reviewing the authorities, said:

> "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the *inequity of* permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

In *New York City* v. *Pine*, 185 U. S. 93, the court held that riparian owners who had waited two years after the commencement by the City of the construction of a dam, by which waters of a river were diverted from flowing through their lands, were barred by laches from enjoining the construction of the dam.

In *Venner* v. *Chicago City Railway Co.*, 236 Illinois 349, the right of a stockholder who failed to bring suit to set aside acceptance by the company of an invalid ordinance until six months after the passage of the ordinance, was denied on the ground of laches.

In *Marks* v. *Merrill Paper Co.*, 203 Fed. Rep. 16, the court held that a minority stockholder, who delayed for nearly a year in instituting suit to set aside the sale of the corporation's assets to another company, was barred by laches.

In *Wright* v. *Tacoma Gas & Elec. Light Co.*, 101 Pacific 865, the court refused to permit a stockholder to set aside a sale by a corporation of all its franchises and property where he delayed in bringing an action for six months.

In *Hill* v. *Atlantic & N. C. R. R. Co.*, 145 N. C. 539 (55 S. E. 854), a stockholder who failed to bring action to set aside a lease of a railroad until 13 months had elapsed, was held barred by his laches.

See, also, *U. S. Trust Co.* v. *Chicago Terminal Transfer R. Co.*, 188 Fed. Rep. 292.

The foregoing authorities fully support the proposition that under the circumstances of the present case the delay by the plaintiffs of almost a year before bringing their action should bar them from obtaining any relief in a court of equity.

WHERE LACHES OF THE PLAINTIFFS IS SHOWN ON THE FACE OF THE BILL IT MAY BE TAKEN ADVANTAGE OF BY DEMURRER OR BY ITS EQUIVALENT, A MOTION TO DISMISS THE BILL.

Maxwell v. *Kennedy*, 8 Howard 210.
Speidel v. *Henrici*, 120 U. S. 377.
Venner v. *Chicago City Railway Co.*, 236 Illinois 349.

VII.

None of the objections made in the Bill to the validity of the Commission's order based upon an alleged want of regularity in procedure is well taken. Such objections are all frivolous in character.

(1) Exception is taken to the fact that the order of the Commission was entered pursuant to the application alone of The New York Central Railroad Company. It is claimed that the order is void in that no application was made to the Commission by either the River Road or the Junction seeking approval and authorization, and a certificate of public convenience and necessity with respect to the proposed lease of the Junction properties to the River Road. This objection is addressed to a question of procedure entirely within the control of the Commission.

Paragraph (19) of Section 1 provides that "The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe", and paragraph (2) of Section 5 provides that "the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations * * * as shall be found by the Commission to be just and reasonable in the premises."

In the present case the New York Central sought control of both the River Road and Junction properties. It proposed to acquire this control by the purchase of all of the stock of the River Road and by then causing to be leased to the River Road the Chicago Junction

properties. Thus the New York Central was the sole party substantively interested in both transactions. There is therefore no reason why it alone could not make the application. But, be this as it may, the bill of complaint shows that both The Chicago River and Indiana Railroad Company and The Chicago Junction Railway Company were represented by counsel and filed briefs and took part in the proceeding before the Commission. These companies are not raising any objection on the ground that they were not named in the application. Having submitted to the jurisdiction of the Commission even they could not now complain of the action of the Commission on the ground that the application was not made in their name. Such being the case the interveners in the proceeding before the Commission have no cause of complaint.

In *United States* vs. *Merchants' etc. Association*, 242 U. S. 178, it was held that an application by a carrier under Section 4 could be waived. The court said:

> "Unless formal application be an indispensable prerequisite to the exercise by the Commission of the power granted by the Fourth Section, its absence or a defect in it could be waived; and it would be waived by the filing of tariffs under the order entered. For the order is permissive merely. The carrier is the only necessary party to the proceeding under Sec. 4."

If it was necessary for The Chicago River and Indiana Railroad Company and The Chicago Junction Railway Company to join in the application they waived it by appearing before the Commission, and by making the sale of the stock and the lease.

Any attack by these plaintiffs against the order of the Commission on the ground that the application was not joined in by the proper parties is frivolous.

(2) Exception is taken to the fact that the Commission prefaced its finding that the acquisition of control approved by it will be in the public interest with the words "Subject to the observance of the above conditions" being certain conditions enumerated in its report.

Presumably it is intended to argue that the prescription of conditions negatives the Commission's finding that the acquisition of control authorized by the Commission will be in the public interest.

The logic of the point thus made is not perceptible, for the Commission has authority by order "to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." It thus follows that the Commission is entitled to define the nature of the transaction that would be in the public interest, circumscribed in such manner as it shall see fit, and to authorize the same to be consummated.

(3) It is asserted that the order of May 16th, 1922, is null and void because it did not prescribe the day upon which the same should take effect, as required by paragraph (2) of Section 15 of the Interstate Commerce Act, which provides that "Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified

period of time, according as shall be prescribed in the order, etc."

The above quoted provision obviously applies only to mandatory orders and would not have appropriate application to a permissive order containing a certificate of public convenience and necessity or approving and authorizing an act sanctioned under paragraph (2) of Section 5. The object of providing a period of thirty days before an order of the Commission shall become effective was of course, intended to give a reasonable time to the parties subject to its mandate to readjust affairs to meet its requirements. Since a permissive order does not call for an enforcement of its terms there is no occasion to require that it shall not become effective until a day certain. In any event, if the parties to whom such order is addressed take no exception to its form the plaintiffs certainly have no right to complain of the same.

(4) It is stated that the order insofar as it purports to approve and authorize the leasing of the properties of the Junction to the River Road is unlawful and void in that no lease of such railroad properties executed by the parties has been submitted to, or approved by, the Commission.

The Act makes no such requirement; the Commission is only interested in imposing upon the transaction such terms and conditions as are necessary to protect the public interest, or the public necessity and convenience. It is not called upon, and has no right to fix the terms of the lease in any other respect. Furthermore the application, report and order show what the substantial terms of the lease are. This is all that is necessary.

Again it should be said that the plaintiffs cannot complain because the lease itself was not filed with, or approved by, the Commission. They cannot intermeddle in the affairs of the lessor or lessee.

For the reasons heretofore assigned it is urged that the decree of the court below denying the motion of the plaintiffs for an interlocutory injunction and dismissing the bill of complaint in the above entitled cause be affirmed.

Respectfully submitted,

ROBERT J. CARY,
Counsel for Appellees,
The New York Central Railroad Company,
and The Chicago River and Indiana
Railroad Company.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE BALTIMORE & OHIO RAILROAD COMPANY, CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY, CHICAGO & ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY, appellants,

v.

UNITED STATES OF AMERICA, THE NEW YORK CENTRAL RAILROAD COMPANY, CHICAGO RIVER AND INDIANA RAILROAD COMPANY, THE CHICAGO JUNCTION RAILWAY COMPANY, THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, AND RICHARD FITZGERALD, appellees.

No. 489.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On December 28, 1920, The New York Central Railroad Company filed its application with the Interstate Commerce Commission for authority and

for a certificate of public convenience evidencing the Commission's approval in respect of the following, viz (Tr. 33):

> (a) The purchase by The New York Central Railroad Company of all of the capital stock of the Chicago River & Indiana Railroad Company.
>
> (b) The leasing by The Chicago Junction Railway Company for a term of 99 years and thereafter at the election of the lessee in perpetuity of all its properties (owned and leased) to the Chicago River & Indiana Railroad Company.
>
> (c) The granting to The New York Central Railroad Company of an option to purchase all of the capital stock of The Chicago Junction Railway Company or all of the properties to be leased by it to the Chicago River & Indiana Railroad Company; all pursuant to the provisions of paragraphs (18) to (20), inclusive, of Section 1 and of paragraph (2) of Section 5 of the Interstate Commerce Act.

On May 16, 1922, after a full hearing and a report containing its findings of fact and its conclusions thereon (Tr. 15), the Commission approved and authorized (a) and (b). Authority to purchase the capital stock or the physical properties of the Chicago Junction Railway Company was denied. The right to prescribe the terms, methods, and character of security, if any, which the New York Central may employ to effectuate the purchase of the capital stock of the Chicago River & Indiana was reserved to the Commission. (Tr. 33.)

The New York Central was the applicant before the Commission. The Chicago Junction Railway and Chicago River and Indiana Railroad appeared by their counsel. (Tr. 15.) Three separate sets of interveners also appeared by their respective counsel. Belt Railway Company and Chicago Railway Terminal Commission also appeared by their respective counsel but it does not appear in what capacity, whether as interveners or otherwise. (Tr. 15.)

The record was voluminous. (Tr. 16.)

The contentions of the intervening carriers are set forth in full in the report. (Tr. 16, 17, 19.) So also with respect to two separate groups of shippers. (Tr. 19, 22.) The Chicago Railway Terminal Commission feared "that the project may prove deterrent to the adoption of the City's plan, not yet formulated, for the unification and coordination of all Chicago Terminals." (Tr. 19.)

On May 29, 1922, the intervening carriers (appellants here) filed a petition for modification of the report and order. (Tr. 34.)

On June 12, 1922, the Commission denied that petition. (Tr. 6.)

No affirmative order of any kind whatsoever was ever entered against the appellants here (interveners before the Commission). All they allege is that they were interveners before the Commission to oppose any such order as that which was entered and that the latter denied their petition for rehearing.

No affirmative order of any kind was ever entered against the New York Central, the applicant before the Commission and an appellee here.

The order of May 16, 1922, is permissive and that only. Under these circumstances the United States filed a motion to dismiss for want of jurisdiction on two grounds. (Tr. 40.)

The District Court (Circuit Judge Baker and District Judges Carpenter and Wilkerson) dismissed the bill without opinion. (Tr. 143.)

ARGUMENT.

I.

THE SUIT IS NOT A SUIT AGAINST THE UNITED STATES PURSUANT TO THE COMMERCE COURT ACT OF JUNE 18, 1910, CH. 309, 36 STAT. 539, AND THE URGENT DEFICIENCIES ACT OF OCTOBER 22, 1913, CH. 32, 38 STAT. 219-221, TO ENJOIN, SET ASIDE, ANNUL OR SUSPEND AN ORDER OF THE INTERSTATE COMMERCE COMMISSION; BUT BY NAMING THE UNITED STATES AS A DEFENDANT THE PLAINTIFFS UNDERTAKE TO ESTABLISH JURISDICTION BEFORE A SPECIAL COURT OF THREE JUDGES AND THEN TO CONDUCT A CASE ON THE MERITS OF THE CONTROVERSY BETWEEN APPELLANTS AND THE APPELLEES OTHER THAN THE UNITED STATES.

Paragraph III of the bill alleges (Tr. 3)—

> This is a suit brought pursuant to the provisions of C. 32 of the Urgent Deficiency Appropriations Act, approved October 22, 1913 (38 Stat. L. 219, 220), to enjoin, set aside, annul, suspend and restrain the enforcement, operation, and execution of an order of the Interstate Commerce Commission entered May 16, 1922, in Finance Docket 1165,

and—

> to enjoin and restrain the Central, the River Road, the Junction, the Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald from the sale and purchase of certain stock and the execution of a certain lease authorized and approved by the Interstate Commerce Commission in said order, as will more fully appear below, said order having been made and entered on the petition of the said Central, and to set aside and hold for naught any and all acts, transactions, matters and things performed and done by any of said defendants under or in alleged conformity with said order of May 16, 1922.

Readily observable is it that under the Urgent Deficiencies Act the bill seeks "to enjoin, set aside, annul, suspend and restrain" a permissive order which has already been executed.

Convinced that such a suit even if successful would avail nothing, the plaintiffs then, in a suit against the defendants other than the United States, prayed for an order adjudging null and void the whole transaction and for an injunction order against the continuance of the same that the *status quo ante* may be completely restored.

In order to accomplish all of these things, a third ground of relief is asked, *i. e.*, numerous interrogatories are propounded to be answered by appellees other than the United States.

The bill of complaint thus confounds an attempted suit between seven railroad companies as plaintiffs

and four railroad companies as defendants under the general equity jurisdiction, with an attempted suit between the same seven railroad companies as plaintiffs and the United States of America as defendant under the Urgent Deficiencies Act. Opposing counsel undertake to justify this course with the argument that after the court had brought all *interested parties* before it the court may then enter an order "which can do entire justice to all parties."[1] (App. Br., 39.)

Obviously if the United States had been named the defendant as provided by statute (see *The New England Divisions Case*, 261 U. S. 184) instead of the carriers, the plaintiffs could not maintain the suit. By naming the United States as one of the defendants, plaintiffs undertook, *first*, to invoke the jurisdiction of the Special Court (see Urgent Deficiencies Act, 38 Stat. 219); and, *second*, then to try issues between plaintiffs and The New York Central, which they make the principal defendant and against whom their main case is made.

Plaintiffs ought not to be allowed to confound an attempted suit against the United States with an attempted suit against the carriers. They should be compelled to declare themselves one way or the other.

The United States has never consented to be sued in such a manner. (*Louisiana* v. *McAdoo*, 234 U. S. 627, 628; *Minnesota* v. *Hitchcock*, 185 U. S.

[1] Wabash Railway Company, on July 16, 1923, withdrew (Tr. 146).

373; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Illinois Central* v. *Public Utilities*, 245 U. S. 493.

II.

THE ORDER ENTERED MAY 16, 1922, BY THE INTERSTATE COMMERCE COMMISSION IS A MERE NEGATIVE ORDER IN SO FAR AS IT RELATES TO THE APPELLANTS AND A MERE PERMISSIVE ORDER IN SO FAR AS IT RELATES TO THE APPELLEES OTHER THAN THE UNITED STATES, AGAINST WHICH ORDER A SUIT TO ENJOIN, SET ASIDE, ANNUL, OR SUSPEND WILL NOT LIE UNDER COMMERCE COURT ACT OF JUNE 18, 1910, CH. 309, 36 STAT. 539, AND THE URGENT DEFICIENCIES ACT OF OCTOBER 22, 1913, CH. 32, 38 STAT. 219-221.

The Transportation Act of 1920, Section 402, provides (Ch. 91, 41 Stat. 477, 478):

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission

a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier

by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public

> convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

The Transportation Act of 1920, Section 407, provides (Ch. 91, 41 Stat. 481):

> (2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

The permissive order of the Commission directed the New York Central to do nothing affirmatively.

On the latter's application, the Commission authorized and approved a purchase of stock and a form of lease. It *ordered* nothing. It issued an approval. For failure to execute the terms of the approval there is no penalty except if executed it must be done as the Commission prescribes. If the New York Central had failed to carry out the terms of the approval after it was issued, could the plaintiffs here, or any other authority, have compelled it to do so?

This Court has held that—

> It will thus be observed, as said by counsel for the Commission, "the power of a court 'to stay the enforcement of an illegal order' is, in a sense, reciprocal to its power to enforce compliance with an order of the Commission, 'if lawful.' * * * And just as the District Court would have been powerless, in the instant case, to compel the appellee to attend the hearing with respect to which the notice had been given, so also was it without lawful authority to annul that notice or to enjoin the Commission from proceeding in the premises." (*United States* v. *Illinois Central*, 244 U. S. 82, 89.)

The case, then, comes to this: Appellants who were unsuccessful interveners before the Commission, and as to whom the order is clearly negative, after waiting almost one full year to make up their minds, sue to enjoin the execution of an already executed permission of the Commission, which authorized and approved the purchase of stock and lease of one rail-

road company by another under the Transportation Act.

Is such a case justiciable under the Urgent Deficiencies Act and the Commerce Court Act?

The Commerce Court Act provides (ch. 309, 36 Stat. 542):

> SEC. 3. That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States.

The Urgent Deficiencies Act, which abolished the Commerce Court, provides (ch. 32, 38 Stat. 219):

> The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. * * *
>
> The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the

same as that heretofore prevailing in the Commerce Court.

In *Illinois Central Railroad* v. *Public Utilities Commission*, 245 U. S. 493, 505, this Court said:

> * * * the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public.

The bill of complaint appears to have been modeled after the bills in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Hooker* v. *Knapp et al.*, and *Eagle White Lead Co.* v. *Interstate Commerce Commission*, 225 U. S. 302. In those cases the railroad companies were also named as defendants in order that injunctions might be prayed against them as no case could be made against the United States.

In the *Procter & Gamble case* Mr. Chief Justice White, in stating the form of the action, said (225 U. S. 287):

> In February, 1911, the Procter & Gamble Company filed a petition in the Commerce Court of the United States making defendants the United States, the Interstate Commerce Commission, and the railroads who had been complained of in the proceeding before the Commission. The petition recited the facts stated above as to the character of the business of the petitioner, the ownership of tank cars, etc., the establishment of the rules for demurrage, their repugnancy to the act to regulate commerce, the injury which had re-

> sulted from being compelled to pay the charges for demurrage in accordance with the rules, the application made to the Commission, and the refusal of that body to award relief. The conception upon which the petition was based is shown in the excerpt in the margin, wherein it was also charged that the order of the Commission dismissing the complaint as above set forth "is null and void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of * * * said demurrage rules."

In that case, as in this case, the United States moved to dismiss for want of jurisdiction.[2] (225 U. S. 289.)

The Commerce Court took jurisdiction of the controversy and then held that the Commission had rightly decided and entered an order dismissing the petition on the merits.

On the appeal of Procter & Gamble, this Court reversed the judgment of the Commerce Court and sustained the motion of the United States to dismiss for want of jurisdiction on the ground that the order was negative. This Court referred to the decision of the Commerce Court which had held that the order of dismissal of the Commission was in effect the equivalent of an order of the Commission granting affirmative relief, thus (225 U. S. 290):

[2] In their brief opposing counsel say (p. 41): "The *carriers* challenged the jurisdiction of the court on the ground that the order of the Commission was negative." The record and briefs in that case disclose that neither the carriers nor the Commission challenged the jurisdiction. The United States alone raised the question.

In disposing of the case, the court considered it in a twofold aspect—first, as to its jurisdiction; and, second, as to the merits of the case. On the first subject it held, *a*, that it had jurisdiction of the cause, and that the refusal of the Interstate Commerce Commission to afford relief to the Procter & Gamble Company was, for the purposes of jurisdiction of the court, the exact equivalent of an order of the Commission granting affirmative relief, and, *b*, as a corollary of this power it was further decided that there was jurisdiction to award pecuniary relief for demurrage if any was illegally exacted.

In *Lehigh Valley Railroad Co.* v. *United States*, 243 U. S. 412, 414, the Act of August 24, 1912 (c. 390, Sec. 11, 37 Stat. 560, 566), known as the Panama Canal Act, prohibited, after July 1, 1914, any ownership by a railroad in any common carrier by water when the railroad might compete for traffic with the water carrier; the Commission was authorized to determine questions of fact as to such competition. On application of carriers the Commission was authorized to extend the time for the relinquishment of the ownership if the extension would not exclude or reduce competition on the water route. Lehigh Valley filed a petition praying for a hearing as to whether the services of a steamship line owned by it would be in violation of the act and for an extension of time. The petition was dismissed and the statute became absolute against the company (33 I. C. C. 699, 706, 716; 37 I. C. C. 77).

The bill was filed to prevent the enforcement of the order of the Commission, and the prayer for relief was as follows:

> Wherefore your petitioner prays that * * * the respondent (United States) and the Interstate Commerce Commission and its members, their agents, servants, and representatives and each of them be perpetually enjoined and restrained by a decree and injunction of this court from enforcing the said order of the Interstate Commerce Commission of May 7, 1915, and from taking any steps or instituting any proceedings for the enforcement thereof, and your petitioner also prays that a provisional or preliminary injunction be issued out of and under the seal of this Honorable Court, enjoining and restraining the respondent and the Interstate Commerce Commission and its members, their agents, servants, and representatives and each of them, to the same purpose, tenor, and effect hereinbefore prayed in regard to said perpetual injunction, and for such other and further relief, general and special, in the premises as justice and equity may require.

The District Court denied the injunction and dismissed the bill (234 Fed. Rep. 682). In holding that the District Court was without jurisdiction over the report and order of the Commission, this Court said (234 U. S. 414):

> Three judges sitting in the District Court denied the injunction asked and dismissed the bill (234 Fed. Rep. 682). Although they

> proceeded to discuss the merits of the case they intimated at the outset a strong doubt whether in any event an injunction could be granted. If this doubt was well founded there is nothing more to be said, *since the ground of jurisdiction is gone.* * * *
>
> The order of the Commission was negative in substance as well as in form. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 292, 293.

It is respectfully submitted that the order in the instant case is negative as to these appellants and not reviewable by the court.

In *Intermountain Rate Cases*, 234 U. S. 476, the order of the Commission was alleged to be of momentous consequence. That order carved the United States into five zones from which commodity rates were fixed on percentage bases to Pacific Coast terminals; that is to say, the rates from Zone No. 1 to intermediate points than to Pacific Coast terminals shall remain the same; that commodity rates from all points in zones numbered 2, 3, and 4 to points intermediate to Pacific Coast terminals that are higher to intermediate points than to Pacific Coast terminals shall not exceed the rates on the same commodities from the same points of origin to the Pacific Coast terminals by more than 7 per cent from points in Zone No. 2; 15 per cent from points in Zone No. 3; and 25 per cent from points in Zone No. 4. All rates so fixed by the order were subject to complaint, investigation, and correction when they conflicted with any other provision of the act.

The order was entered under Section 4 of the Act to Regulate Commerce, as amended, which established the "hard and fast" long and short-haul clause, relief from which could be obtained only by the application to the Commission on a proper showing. The order directed the carriers to conform to its terms. It was affirmative in all respects and this Court so held.

In *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, neither the words "negative order" nor words of any similar import are mentioned in the opinion. It does not appear ever to have been suggested by counsel or intimated by the court that the order in that case had any of the characteristics of a negative order.

In *McLean Lumber Co.* v. *United States*, 237 Fed. Rep. 460, the ruling of the District Court is not in line with the decisions of the Supreme Court in the *Procter & Gamble* and *Lehigh Valley* cases. Passing the question whether that case has any bearing whatever on the instant case, it is enough to say that the bill was dismissed on the merits and as the plaintiff failed to appeal, there was no opportunity to review the action of the District Court in taking jurisdiction.

Is it an enforcible order of the Commission subject to review by the judicial power under the Urgent Deficiencies Act? If appellants' contention is sound, the Chicago Railway Terminal Commission, which appears to represent a department or an agency of that City, might maintain a similar bill, for its "fears"

are "that the project may prove deterrent to the adoption of the City's plan, not yet formulated, for the unification and coordination of all Chicago terminals, the establishment of universal freight stations and other measures which may hereafter be adopted to relieve congestion in the downtown shipping district, and would prefer to have the Junction and River Road properties remain neutral pending the outcome of its investigations and the adoption by legislation or otherwise of a comprehensive policy." (Tr. 19, 21.) If such a bill were filed by that Commission, it would meet at once with the objection that the grounds upon which relief was asked were purely speculative. But they are no more speculative than the estimated millions of losses for alleged failure to gain competitive traffic because one railroad company has purchased the stock of another and leased its railroad under a permit of the Interstate Commerce Commission authorized by the Transportation Act. About 90 per cent of the 400 shippers served by the Junction and River Road urged the approval of the proposed plan, although 30 of those indorsements were subsequently withdrawn. (Tr. 16.)

Chicago is the greatest railroad terminal in the world. It is served by approximately 35 trunk lines, any or all of which have the identical speculative interest as the appellants. This Court has held that the right to compete for traffic is not a constitutional right.

Generally, the appellees allege (Tr. 10, 53, 54) "that the loss in net earnings to plaintiffs which will result from the acquisition of control approved and authorized by the Commission in its order will exceed $10,000,000 per annum." The whole foundation underlying the bill appears to be that the arrangement strengthens the New York Central and weakens the Baltimore & Ohio, the Pennsylvania Company, and the other appellants in their efforts to gain "competitive traffic." (Tr. 53, 54.) This Court has held that the right of a carrier to compete for traffic is not a constitutional right and that "the final contention, which is that the Commission's order in effect deprives the New Orleans, Texas & Mexico of its property without due process of law, *by denying to it the right to contract and compete for traffic* originating on the line of the Louisiana & Pacific, *is transparently unsound.*" (*O'Keefe, Receiver*, v. *United States*, 240 U. S. 294, 304.)

As appellants have shown no actual loss of specific traffic or earnings and as the terminals are still open to all, the mere objection to the purchase of the capital stock and the leasing by one railroad of another is not a subject to which the equity jurisdiction of the court attaches. If it is, not only railroads serving Chicago but any part of the country may maintain a similar suit. Under the Transportation Act we are bound to consider the transportation system as a whole. That act, all parts thereof, and all of the carriers subject thereto must now be kept

in full view at all times to the end that all of the incidents to the development of an adequate transportation may move forward at once and together. Mere apprehension of interference with business is not a subject of the equity jurisdiction. *Edward Hines Yellow Pine Trustees* v. *United States*, No. 91, this Term.

CONCLUSION.

The motion of the United States to dismiss for want of jurisdiction should be sustained and the decree should be affirmed.

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○

Office Supreme Court, U. S.
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WM. R. STANSBURY
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No. 489.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellee.

JANUARY, 1924.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924

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BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is an appeal from a decree of the District Court of the United States for the Northern District of Illinois, Eastern Division. The appellants here were the plaintiffs in the lower court. The suit was instituted for the purpose, among other things, of obtaining a decree of the court annulling and setting aside an order of the Interstate Commerce Commission, which is in words and figures as follows, namely:

ORDER.

> At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 16th day of May, A. D. 1922.

Finance Docket No. 1165.

In re application of the New York Central Railroad Company for authority and for a certificate of public convenience evidencing the Commission's approval in respect of the following:

(*a*) The purchase by the New York Central Railroad Company of all of the capital stock of the Chicago River & Indiana Railroad Company.

(*b*) The leasing by the Chicago Junction Railway Company for a term of 99 years and thereafter at the election of the lessee in perpetuity of all its properties (owned and leased) to the Chicago River & Indiana Railroad Company.

(*c*) The granting to the New York Central Railroad Company of an option to purchase all of the capital stock of the Chicago Junction Railway Company or all of the properties to be leased by it to the Chicago River & Indiana Railroad Company; all pursuant to the provisions of paragraphs (18) to (20), inclusive, of section 1 and of paragraph (2) of section 5 of the interstate commerce act.

A hearing and investigation of the matters and things involved in this proceeding having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of facts and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the acquisition by the New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital

stock at a price not exceeding the sum of $750,000 be, and the same is hereby, approved and authorized.

It is further ordered, That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized.

Provided, That the right to prescribe the term [terms], methods, and character of securities, if any, which the New York Central Railroad Company may employ to effectuate the purchase of the capital stock of the Chicago River & Indiana Railroad Company be, and it is hereby, reserved to the Interstate Commerce Commission: *And provided further*, That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive.

It is further ordered, That said application, so far as it seeks authority to purchase the capital stock or the physical property of the Chicago Junction Railway Company, be, and the same is hereby, denied without prejudice to future proceedings.

By the Commission:

[SEAL.] GEORGE B. MCGINTY,
Secretary.

(Rec. 33–34.)

The conditions mentioned in the order are:

1. The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located in Chicago in order to preserve for the shipper the present direct access to the railroad officials.

2. The present neutrality of handling traffic in and outbound by the Junction and River Road organization shall be continued so as to permit equal opportunity for service to and from all trunk lines reaching Junction rails, without discrimination as to routing or movement of traffic which is competitive with the traffic of the Central, and without discrimination against such competitive traffic in the arrangement of schedules.

3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central.

4. For the purpose of assessment of switching charges the Junction and River Road shall continue to be treated as a single line to the same extent as at present, so that the carrying out of this plan will not in and of itself result in increasing the charge to any shipper for the service.

5. Subject to subsisting car service regulations, cars made empty on the rails of the Junction and River Road shall be available for outbound loading in the same manner and

to the same extent as at present, irrespective of routing.

6. Whenever additional cars are required for outbound loading because of inadequacy of available car supply on the Junction and River Road rails at any given time, for any cause, orders for such additional cars shall be accepted from the shipper by the local Junction organization and by it promptly transmitted to the designated trunk line without discrimination, and all cars ordered by and delivered to the Junction shall be promptly moved to the shippers by the Junction without discrimination on account of proposed routing.

7. The Junction shall accept, handle, and deliver all cars in and out bound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

8. The National Code of Demurrage Rules, as in effect from time to time, including the average agreement, shall be applied by the Junction and River Road to each industry served by either of them on all in and out bound cars irrespective of what carrier or carriers may be interested in the line haul.

9. Shippers served by the Junction and River Road shall be entitled to the same basis of switching charges as prevails in the Chicago switching district generally, and no attempt shall be made to establish any different basis of local or connecting line switching charges than that which prevails in the Chicago

switching district generally for the same or similar service under substantially similar conditions.

10. No change shall be sought in the present method of basing rates to and from the Chicago switching district as a single point upon which rates are now based without regard to the character of the movement in and out of such district.

11. Present trap-car arrangements for the transfer of l. c. l. freight at the Junction Union Station, at connecting-line freight stations, or at connecting points reached by the Junction and River Road, shall be continued, but this condition shall not apply to routine changes in management and operation of trap-car service.

12. Continuance of present operating arrangement on the Junction properties shall include the maintenance of existing shipping and billing arrangements at the Junction Union Freight Station, in so far as such arrangements are within the control of the Junction.

13. The Junction shall, if ordered by us, establish station facilities for the receipt of inbound l. c. l. freight at a point convenient and accessible to shippers wishing to make use of the same, to which freight may be delivered by all trunk-line carriers, without discrimination, and there distributed through the medium of the Junction's operating force.

14. Neither the approval of the purchase by the Central of the stock of the River Road for the sum specified, nor of the leasing to the latter of the properties of the Junction, shall be taken as establishing or tending to establish

the fair value of the respective properties in any other proceeding, nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable.

15. The carrying out of the plan as authorized herein shall be taken to be without prejudice to the adoption of any plan or plans in the future by the City of Chicago, by us or by any other public agency, for unified or coordinated terminals, and neither the Central, the River Road nor the Junction shall urge the authority herein given or the situation resulting therefrom as a ground for opposition to such plan or plans of said city, our plans or those of any other public agency.

16. Nothing contained in this authorization shall be taken as permitting the River Road and Junction properties to be considered as a part of a single system with that of the Central for any of the purposes of section 15a or section 20a of the act.

17. Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction is retained to reopen the proceeding on our own motion for the same purpose. (Rec. 22–24.)

The order of May 16, 1922, modified by conditions as aforesaid, is based upon a report of the same date, and the report and order were made and entered in a

proceeding then pending before the Commission, wherein the New York Central Railroad Company, the Chicago River & Indiana Railroad Company, the Chicago Junction Railway Company, and the appellants herein were parties and appeared and were represented by their respective counsel. (Rec. 15.)

In said report, wherein the New York Central Railroad Company was called the "Central," the Chicago River & Indiana Railroad Company was called the "River Road," and the Chicago Junction Railway Company was called the "Junction," the Commission, among other things, said:

> Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest. (Rec. 24–25.)

The report and order were made by the Commission under authority conferred upon it by the interstate commerce act, paragraph (2) of section 5 of which reads as follows:

> Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving

> the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

Reasons advanced by the appellants in support of their contention that the order is invalid are set forth particularly in Paragraph X, pages 10 to 15, inclusive, of the bill of complaint, and may be summarized as follows:

1. In making the order the Commission did not comply with the requirements of paragraphs (18) to (20), inclusive, of section 1 of the interstate commerce act.

2. The Commission's conclusion that the doing of the things authorized by the order to be done will be in the public interest is not supported by the record upon which the order is based.

3. The doing of the things authorized by the order to be done will constitute a consolidation of the carriers involved into a single system for ownership and operation.

4. The order was made in a proceeding before the Commission in which the New York Central Railroad Company was the only applicant.

5. In stating its conclusion that the doing of the things authorized by the order to be done will be in

the public interest, the Commission did not comply with the requirements of paragraph (2) of section 5 of said act.

6. The time within which it is to take effect is not stated in the order.

7. The lease, the execution of which is authorized by the order, has not been submitted to or approved by the Commission.

The decree of the lower court, filed June 28, 1923, is in words and figures as follows, namely:

> This day this cause coming on to be heard before a Court composed of a Circuit Judge, and two District Judges, pursuant to the statute in such case made and provided, upon the bill of complaint of said plaintiffs, and upon the motion to dismiss of the United States, The New York Central Railroad Company, The Chicago River and Indiana Railroad Company, The Chicago Junction Railways and Union Stock Yards Company, The Chicago Junction Railway Company and Richard Fitzgerald, and upon the answer of the Interstate Commerce Commission, and upon the motion of the plaintiffs for an interlocutory injunction, all parties being before the Court in person as well as by counsel, the Court having heard the arguments of counsel and being fully advised in the premises,
>
> Doth order, adjudge, and decree that the motion of the plaintiffs for an interlocutory injunction be and the same is hereby denied;
>
> And thereupon the plaintiffs moved the court for leave to amend their said bill of com-

plaint instanter, which said motion was thereupon granted, and said amendment having been made instanter, thereupon on motion of the defendants, the answer of the Interstate Commerce Commission and the several motions of said other defendants to dismiss the bill of complaint were ordered to stand to the bill of complaint as amended.

Thereupon said cause came on again to be heard before the Court constituted as aforesaid, upon the bill of complaint as amended and upon the motion of the plaintiffs for an interlocutory injunction, and upon said motions of said several defendants to dismiss the said bill of complaint as amended, the Court having heard the arguments of counsel and being fully advised in the premises.

Doth order, adjudge, and decree and it is hereby ordered, adjudged, and decreed that the motion of the plaintiffs for an interlocutory injunction be and the same is hereby denied and that the several motions of said several defendants to dismiss said bill of complaint as amended be and the same are hereby granted, and

It is hereby ordered, adjudged, and decreed that the said bill of complaint as amended be and the same is hereby dismissed at plaintiffs' costs. (Rec. 143–144.)

In this brief we will endeavor to show that the order of the Commission complained of by appellants is valid.

ARGUMENT.

I.

THE VALIDITY OF THE ORDER OF MAY 16, 1922, IS NOT DEPENDENT IN ANY WAY UPON COMPLIANCE WITH THE REQUIREMENTS OF PARAGRAPHS (18) TO (20), INCLUSIVE, OF SECTION 1 OF THE INTERSTATE COMMERCE ACT.

The text of the paragraphs mentioned is set forth in Paragraph V on pages 6 to 8, inclusive, of the bill of complaint, and prohibits any carrier subject to said act from extending its line of railroad, or constructing a new line of railroad, or acquiring or operating any line of railroad or extension thereof, or engaging in transportation under said act over or by means of such additional or extended line of railroad, or abandoning all or any portion of a line of railroad or the operation thereof, "unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require" such extension, etc., or "permit of such abandonment." In making the order of May 16, however, it will be observed that the Commission based its action upon the authority conferred upon it by paragraph (2) of section 5 of said act, and it is therefore apparent that the order is not affected in any way by the fact that the Commission did not comply with the requirements of the paragraphs of section 1 of the act above mentioned.

II.

THE COMMISSION'S CONCLUSION THAT THE DOING OF THE THINGS AUTHORIZED BY THE ORDER TO BE DONE WILL BE IN THE PUBLIC INTEREST IS SUPPORTED BY THE RECORD UPON WHICH THE ORDER IS BASED.

Subdivisions 6 and 7 of Paragraph X of the bill of complaint contain allegations as follows:

> The record made before the Commission upon which the said order is based contains no evidence that the acquisition by the Central of control of the River Road by the purchase of the capital stock of the River Road will be in the public interest; but, on the contrary, the said record contains evidence which clearly shows that the said acquisition of control is and will be directly contrary to public interest and to a sound public policy.
>
> The record made before the Commission upon which the said order is based contains no evidence that the acquisition by the River Road of the control of the properties of the Junction under a lease will be in the public interest; but, on the contrary, the said record contains evidence which clearly shows that the said acquisition is and will be directly contrary to the public interest and to a sound public policy. (Rec. 7.)

Since appellants' allegations concerning lack of evidence in the record before the Commission are denied in the Commission's answer, the court, in the absence of the submission of evidence by appellants to the contrary, which can result only from the submission in evidence before the court of a certified

copy of the record made in the proceeding before the Commission, will presume that the evidence contained in that record is sufficient to support the Commission's conclusion that the doing of the things authorized by the order to be done will be in the public interest. In this connection, however, we call attention to the report of the Commission, which is referred to in and made a part of the order, and in which the Commission, among other things, said:

> The record, which is voluminous, established the following facts: The territory served by the Junction and River Road lines is entirely within the so-called Chicago switching district, and is treated in the application as dividing naturally into five groups, of which two are of primary importance for the purposes of this proceeding, namely, the Central Manufacturing District and the Stock Yards group. The other three comprise the sections north from the stockyards to Fifteenth Street, east to Lake Michigan and southwest to Central Park Avenue, respectively, including what is known as the Kenwood Manufacturing District. The Central now controls by stock ownership the Indiana Harbor Belt Railroad, hereinafter termed the Harbor Belt, which is located for the most part outside of Chicago and connects the Central main line with the River Road at Elsdon and with that road and the Junction at Forty-ninth and Oakley Streets, and again with the latter line at Forty-ninth and Morgan Streets. The other eastern trunk lines, intervening in this proceeding and competing

with the Central for line-haul traffic, connect with the terminal facilities afforded by the Junction and River Road either directly from their own rails or by means of other belt lines, namely, the Belt Railway of Chicago, controlled by a group of carriers, the Chicago & Western Indiana Railroad, likewise so controlled, and the Baltimore & Ohio Chicago Terminal Railway, owned by the Baltimore & Ohio Railroad. The Junction and River Road properties, the Elgin, Joliet & Eastern Railroad, and the Illinois & Northern Railroad comprise the only independently owned terminals in the Chicago switching district. The Junction and River Road handle traffic to and from all of the 23 trunk lines entering Chicago.

The nucleus of the present Junction system was constructed in 1865 by the stockyards interests, which operated the property up to 1887, all of the trunk lines entering the yards for both inbound and outbound traffic. From 1887 to 1893 the lines were operated by a transfer association controlled by the carriers. The stockyards company resumed operation from 1893 to 1897, in which year the properties were leased to the Chicago & Indiana State Line Company for 50 years, and in 1898 the lines were merged with the Chicago, Hammond & Western Company under the corporate name of Chicago Junction Railway Company. In 1907 the Junction sold the Chicago, Hammond & Western properties to the Harbor Belt.

Besides serving the stockyards and Packingtown, the Junction performs terminal service for all the carriers in reaching the Central Manufacturing District, which as an institution has been in existence for about 15 years and has 180 industries, producing a tonnage of over 100,000 carloads per year, and 100,000 tons per year of l. c. l. freight. This district is in the geographical center of the city and is capable of accommodating not less than 500 additional industries and of producing more than twice the present annual tonnage of freight.

The movement of livestock in and out of the Junction yards is essentially different from the method of handling the dead freight, in that each carrier moves its trains to the unloading chutes with its own power and goes into the pens for outbound stock destined for its own line. All parties concede that that is the only practical method of handling that traffic. In the case of dead carload freight inbound the line-haul carrier places its loads in the Junction yards at Ashland Avenue, where they are picked up by Junction engines and crews and moved to the point of unloading. Outbound carloads are picked up by the Junction crews at team and industry tracks and moved to its 49th Street classification yards, then taken out and classified for destination by the line-haul carriers, each of which has in such yards an appropriate number of tracks designated to receive its traffic. For outbound l. c. l. shipments the Junction maintains a union freight station at 15th Street and Western Avenue, where any number of

packages can be drayed by a shipper and billed to destination on as many different trunk lines to any point in the United States or Canada. Such shipments are collected by the Junction in a car or cars for each carrier and delivered to the proper track in the classification yards as in the case of carload freight. A trap car service is also maintained. Dressed meats from Packingtown are handled through the yards in like manner, each packer looking after the cleaning and icing of its own empty cars at a convenient point on the Junction rails. The Junction performs no function as to routing of a shipment, either carload or l. c. l., and if through inadvertence a shipment is offered without routing it is held for instructions. Each carrier makes regular scheduled trips to the classification yards to leave and pick up its own line-haul freight, the number of trips per day depending upon the volume of business handled by the individual carrier. Thus the Junction organization performs purely a switching service as to those movements, the charges therefor constituting a part of the through rates published by the line-haul carriers. The Junction lines also serve an important purpose in providing facilities on a trackage basis for the interchange of traffic passing through the Chicago gateway. However, with the growth of the industrial switching business, the increased density of traffic has produced such a congestion as to make it desirable to perform certain services at points farther out on the belt lines. Earnings of the Junction in the

> past have not been such as to permit of the expansion of its facilities to meet the growing requirements of the district served, and this is true as to interchange as well as switching and team track facilities. (Rec. 16–18.)

We do not understand that appellants in their bill of complaint have denied any of the statements of fact included in the paragraphs of the Commission's report above quoted, and upon which is based the Commission's conclusion that the doing of the things authorized by the order to be done will be in the public interest, and we feel certain an attempt to do so would not be successful, because the statements are nearly all descriptive in character; that is to say, they describe the terminal facilities involved and the territory in Chicago in which they are located, the carriers which on May 16, 1922, were engaged in operating the facilities, the transportation services the carriers were then performing, and the manner in which the carriers were at that time discharging their duties as common carriers in the premises.

In stating the reasons which prompted it to reach the conclusion it reported, the Commission, among other things, further said:

> There are grave objections to an unconditional approval of the plan under consideration. Much testimony was adduced at the hearings, and divergent opinions were expressed, as to the relative merits of cooperative, singly controlled and independently controlled terminals. That discussion need not be reproduced here. The policies and plans of the city with respect

to the general terminal situation have not yet fully developed, and it is obviously impossible for anyone to determine at this time the ultimate goal which ought to be attained. It is believed, however, that pending final determination of future policies, the greatest good can be attained by the continuance, for the time being, of the competitive terminal situation. This can be best accomplished by bringing the present neutral Junction properties into closer relation with a trunk line like the Central. The Central's terminal facilities are relatively inadequate as compared with the competitor eastern trunk lines, but the Central controls extensive facilities for classification and interchange which are complementary to the Junction properties. The stronger competition and the connection between the Junction properties and the Harbor Belt facilities which would thus be brought about, would not only insure to the shippers of the Junction the necessary expansion and elasticity of facilities, together with the assistance of an interested trunk line in times of car shortage, and other emergencies, but would also remove congestion from the closely hemmed-in district served by the Junction and thus open facilities for expedition in the handling of traffic in and out, and also for handling traffic from one part of the city to another. * * * (Rec. 21.)

It will be observed that the deductions of the Commission are based, to some extent, at least, upon matters of which both the Commission and the court may properly take judicial notice, and for this

reason, in addition to the reason first above set forth, it is apparent, we submit, that appellants' allegations concerning lack of evidence have no foundation upon which to rest.

III.

THE DOING OF THE THINGS AUTHORIZED BY THE ORDER TO BE DONE WILL NOT CONSTITUTE A CONSOLIDATION OF THE CARRIERS INVOLVED INTO A SINGLE SYSTEM FOR OWNERSHIP AND OPERATION.

In subdivision 8 of Paragraph X of the bill of complaint, appellants, among other things, allege that,

> * * * acquisition by the Central of the control of the River Road by the purchase of the capital stock of said River Road and acquisition by the River Road of control of the Junction by lease of its properties, as set forth in the application of the Central to the Commission and authorized by the Commission, will constitute a consolidation of the Central, the River Road and the Junction into a single system for ownership and operation, and, therefore, the Commission is without authority by order to approve and authorize such acquisition. (Rec. 7–8.)

In the absence of controlling statutory provisions, the general rule is that a consolidation takes place only where, after the consolidation, the consolidated corporations, whose properties, including rights and franchises, are consolidated, cease to exist, except for the doing of things which may be necessary to properly protect their creditors, and a new corporation is created to take over and operate the properties as their owner.

In *Lee* v. *Atlantic Coast Line R. Co.*, 150 Fed. 775, pertinent language used by Pritchard, Circuit Judge, was as follows:

> The results of a merger are entirely different from those of a consolidation. Ordinarily, when corporations of two or more States "consolidate," in the technical sense of the term, the old corporations are dissolved and a new corporation comes into being in each State. Note to *Morrison* v. *Snuff Company*, 89 Am. St. Rep. 655; 2 Elliott on Railroads, sec. 335. However, when two corporations unite by way of merger, the result is not the same as in case of consolidation. In the case of merger the one is absorbed by the other, and when we come to apply the true test as to whether, under a given statement of facts, there has been a merger, it becomes necessary to ascertain whether the existence of one of the corporations, as such, has been preserved, and the other has ceased to exist. In the case of *Atlantic & Gulf R. R. Co.* v. *Georgia*, 98 U. S. 359, 25 L. Ed. 185, the court, in discussing the question as to the difference between a merger and a consolidation, among other things, said:
>
> > "That generally the effect of consolidation as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result."

Also in the case of *Vicksburg, etc., Telephone Co.* v. *Citizens' Telephone Co.*, 79 Miss. 341, 30 South. 725, 89 Am. St. Rep. 656, it is said:

> "There seems to be a great confusion as to the difference between consolidation and merger and sale. Rightly understood, there never can be a consolidation of corporations, except where all the constituent companies cease to exist as separate corporations, and a new corporation, to wit, the consolidated corporation, comes into being. A merger, rightly understood, is not the equivalent of consolidation at all, but exists where one of the constituent companies remains in being, absorbing or merging in itself all the other constituent corporations." (Id. 787–788.)

In *Thompson on Corporations*, second edition, volume 5, it is said:

> Consolidation takes place where two or more existing corporations are consolidated into a single corporation, and the existence of the uniting corporations is terminated and the consolidated company succeeds in a general way to the rights and franchises and acquires the property and assumes the obligations and liabilities of all the constituent companies. In the ordinary legal phraseology the term "consolidation" is generally used to indicate both the act and the result of uniting two or more corporations into one. (Section 6035.)
>
> * * * * *
>
> "There seems to be a great confusion as to the differences between consolidation and

> merger and sale. Rightly understood, there never can be a consolidation of corporations, except where all the constituent companies cease to exist as separate corporations, and a new corporation, to wit, the consolidated corporation, comes into being." Generally the effect of consolidation in strict legal parlance is that the consolidating corporations are dissolved and cease to exist, except, perhaps, for certain purposes and a new and distinct corporation is created by the consolidation, with the combined rights, franchises, privileges, and property of all the consolidating corporations. (Section 6040.)

It will be observed that the Commission has not acted or *purported* to act under paragraphs (4) to (6) of section 5 of the act. The complete plan which these paragraphs call for has not been formulated or promulgated. In said paragraph (6) it is, among other things, provided that—

> It shall be lawful for two or more carriers by railroad, subject to this act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, * * *.

In construing this language in *Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508, the Commission said:

> The question has been raised as to whether an acquisition of control under the circumstances proposed amounts to a consolidation

> of the carriers concerned "into a single system for ownership and operation," as to which type of control we have no jurisdiction under paragraph (2) of section 5. We have given consideration to the question and find that an acquisition of control consummated as proposed and exercised subject to the conditions to be imposed by our order herein, does not involve the consolidation of such carriers into a single system for ownership and operation. It is not enough to constitute such a consolidation that the carriers or their properties be consolidated into a single system for operation, or for management, or for management and operation, but it must also appear that they are consolidated for ownership. Since each of the carriers will retain its corporate identity and the legal title to its property, no consolidation of the kind defined by the statute will result. (Id. 524–525.)

It may be that the language contained in the provision last above quoted is sufficient to include a merger, properly so called, but we submit that it is not sufficient to bring within the term "consolidation" a change in control over the property of a common carrier, by the execution of a lease or the purchase of stock, which is not accompanied by a corresponding change in the title to the physical and other property involved.

Because of the matters above set forth, we respectfully submit that appellants' contention, that the doing of the things authorized by the order to be done will constitute a consolidation of the carriers

involved into a single system for ownership and operation, is unsound and can not be sustained by the court.

IV.

THE APPLICATION FILED IN THE OFFICE OF THE COMMISSION WAS A SUFFICIENT BASIS FOR THE ACTION THEREAFTER TAKEN BY THE COMMISSION, INCLUDING THE MAKING AND ENTERING OF THE ORDER.

Subdivisions 11 and 14 of Paragraph X of the bill of complaint read as follows:

> 11. The said order was entered pursuant to the application of the Central alone, and, in so far as it purports to approve and to authorize the acquisition by the River Road of the control of the property of the Junction under a lease, said order is unlawful and void in that no application has been made to the Commission by either the River Road or the Junction seeking the approval and authorization of such acquisition. (Rec. 9.)
>
> 14. The said order was entered pursuant to the application of the Central alone, and, in so far as it purports to approve and to authorize the leasing of the properties (owned and leased) of the Junction to the River Road, it is unlawful and void in that no application has been made to the Commission by either the River Road or the Junction for a certificate that the present or future public convenience and necessity require, or will require, the acquisition and operation by the River Road of the properties operated by the Junction on May 16, 1922. (Rec. 9.)

For reasons set forth under point I of this brief, wherein we called attention to the obvious fact that,

in making the order, the Commission acted under authority conferred upon it by paragraph (2) of section 5 of the interstate commerce act, an extended discussion of the subject matter of the subdivision last above quoted is not necessary and would not be appropriate.

The subject matter of the other subdivision quoted is covered by paragraph (2) of section 5 of the act, hereinbefore quoted, and an examination thereof will show the pertinent words to be, "upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act." It will be observed that the right of the Commission to make an order like the one under consideration here does not depend upon whether every carrier to be named in the order has filed in the office of the Commission an application relating to the subject matter of the order. The filing of such an application by one of the interested carriers is sufficient.

However, if an application by all the interested carriers were found to be necessary, the court would have no difficulty in ruling that the application involved in this case is sufficient, because, as hereinbefore stated, the Chicago River & Indiana Railroad Company and the Chicago Junction Railway Company appeared by their counsel in the proceeding before the Commission, and that they urged favorable action by the Commission upon the application which had previously been filed in the Commission's office by the New York Central Railroad Company will not be denied by appellants.

V.

N STATING ITS CONCLUSION THAT THE DOING OF E THINGS AUTHORIZED BY THE ORDER TO BE DONE LL BE IN THE PUBLIC INTEREST, THE COMMISSION MPLIED FULLY WITH THE REQUIREMENTS OF PARA-APH (2) OF SECTION 5 OF THE INTERSTATE COM-RCE ACT.

Subdivision 12 of Paragraph X of the bill of com-int reads as follows:

> The order of the Commission of May 16, 1922, approving the acquisition as described therein, was made with the specific finding "Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road, and the leasing to the River Road of the properties (owned and leased) of the Junction, will be in the public interest." The finding of the Commission does not comply with the provisions of paragraph (2) of Section 5 of the Interstate Commerce Act, which require the Commission to be of opinion that the acquisition of control approved by the Commission "will be in the public interest." (Rec. 9.)

If, by the use of the language quoted, appellants tended to convey the idea that because the Com-ission's finding concerning public interest is modi-d by the words "subject to the observance of the ove conditions," we are unable to see how the sition thus taken by them can be sustained. The nditions referred to were prescribed and made a rt of the order by the Commission under the au-

thority conferred upon it by said paragraph (2), as hereinbefore shown, and are therefore as much a part of the order and as binding upon the carriers named therein as are the words which are directly connected with the permission granted by the Commission to said carriers and complained of by the appellants.

VI.

THE FACT THAT THE TIME WITHIN WHICH THE ORDER WAS TO TAKE EFFECT WAS NOT SPECIFICALLY STATED THEREIN DID NOT RENDER THE ORDER INVALID.

Subdivision 13 of Paragraph X of the bill of complaint reads:

> By paragraph (2) of section 15 of the interstate commerce act, except as otherwise provided therein "all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, etc." The order of May 16, 1922, did not prescribe the day upon which the same should take effect; for that reason the said order is null, void, and of no effect. (Rec. 9.)

A contention the same in principle as that here made by appellants was involved in the case of *New York Cent. & H. R. R. Co. et al.* v. *Interstate Commerce Commission*, 168 Fed. 131, and in ruling it to be without merit the court said:

The first ground of invalidity urged is that the order fails to specify the time during which it shall remain in force. Section 15 of the interstate commerce act as amended, under which this order was made, provides that:

> "All orders of the Commission, except orders for the payment of money, shall * * * continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission."

The Commission did not state in this order how long it should remain in force. Strictly speaking, the directions of the statute were not complied with. Nevertheless, we think that this inaction on the part of the Commission did not invalidate the order. The act itself prescribes the maximum time an order can remain in force. The Commission may prescribe a shorter time, but, in the absence of such limitation, an order remains in force the maximum time—two years. The law reads the limitation into it. * * * (Id. 134–135.)

Under the ruling of the court above set forth, the order would become effective at the end of thirty days after it was issued, if a different effective date were not named therein, by virtue of the provisions of paragraph (2) of section 15 of said act. The subsequent amendment of this statute has not changed the application thereto of the principle announced in this decision.

VII.

THE FACT THAT A LEASE COVERING THE PROPERTIES OWNED AND LEASED BY THE CHICAGO JUNCTION RAILWAY COMPANY WAS NOT SUBMITTED TO OR APPROVED BY THE COMMISSION DOES NOT RENDER THE ORDER INVALID.

Subdivision 15 of Paragraph X of the bill of complaint reads:

> The said order, in so far as it purports to approve and to authorize the leasing of the properties (owned and leased) of the Junction to the River Road is unlawful and void in that no lease of the railroad properties (owned and leased) of the Junction to the River Road executed by the parties thereto has been submitted to, or been approved by, the Commission. (Rec. 9–10.)

As hereinbefore shown, the Commission by order simply authorized the making of the lease referred to, in accordance with the power conferred upon it by paragraph (2) of section 5 of said act, and, since the execution of the lease would naturally follow the making of the order, we think it is obvious that the validity of the action taken by the Commission in making the order can not be made to depend in any way upon things which are to be done after the order is issued.

For the reasons above set forth we insist that the appeal in this case should be dismissed.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellee.

JANUARY, 1924.

○

FILED
JAN 15 1924
WM. R. STANSBU
CLERK

IN THE

Supreme Court of the United States.

No. 489

THE B. & O. RAILROAD COMPANY ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA ET AL.,
Appellees.

BRIEF ON BEHALF OF THE APPELLEES, THE CHICAGO JUNCTION RAILWAY COMPANY, THE CHICAGO JUNCTION RAILWAYS & UNION STOCK YARDS COMPANY AND RICHARD FITZGERALD, APPELLEES.

SILAS H. STRAWN,
GUY CURRIER,
FREDERICK C. HACK,
Solicitors for said Appellees.

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Of Counsel.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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I.

STATEMENT.

This statement is limited solely to the recital of such facts as are necessary to present clearly the defense of the above named appellees,—The Chicago Junction Railway Company (hereinafter called the "Junction Company"), The Chicago Junction Railways & Union Stock Yards Company (hereinafter called the "Holding Company") and Richard Fitzgerald.

As appears from the record, the New York Central Railroad Company filed an application with the Interstate Commerce Commission, under the provisions of

paragraphs (18) to (20) of Section 1 and of paragraph (2) of Section 5 of the Interstate Commerce Act as amended, for authority to acquire the shares of stock of another railroad company, to wit, The Chicago River & Indiana Railroad Company (hereinafter called the "River Road"), and for permission to acquire by lease for said "River Road" the railroad of the appellee, the "Junction Company."

At the time of the application, the appellee, the "Junction Company," was a common carrier organized under the laws of the State of Illinois and operating a railroad located wholly in Cook County, Illinois.

The "River Road" was also a common carrier organized under the laws of the State of Illinois and owning and operating a railroad located wholly in Cook County, Illinois.

The appellee, the "Holding Company," was a New Jersey corporation. It owned all of the shares of stock of the "Junction Company" and fifty per cent of the shares of stock of the "River Road."

The appellee, Richard Fitzgerald, was a citizen of Chicago, Illinois. He owned the other fifty per cent of the shares of stock of the "River Road."

The appellants intervened in the proceeding before the Interstate Commerce Commission and opposed the petition of The New York Central Company.

The Interstate Commerce Commission, after an investigation and hearing entered an order (*solely under the provisions of paragraph* (2) *of Section* 5 of the Interstate Commerce Act), approving the acquisition by The New York Central of the shares of stock of the "River Road" and approving the lease to the latter company of the railroad of the "Junction Company."

The order was merely "negative" as to the appellants and "permissive" as to appellees.

It did not impose any obligation upon either The New York Central to buy, or upon either the "Holding Company" or Fitzgerald to sell, or upon the "Junction Company" or "River Road" to lease.

The bill asserts that thereafter The New York Central purchased from the "Holding Company" and from Fitzgerald, all of the shares of stock of the "River Road" and that the latter company acquired by lease the railroad of the "Junction Company."

After these transactions had been consummated (as the bill asserts) about a year, the appellants filed their bill of complaint in this proceeding in the District Court for the Eastern Division of the Northern District of the State of Illinois.

As stated in the bill of complaint, the jurisdiction of the court is predicated solely upon the provisions of Chapter 32 of the "Urgent Deficiency Appropriations Act," approved October 22, 1913.

The jurisdiction of the court is not asserted or claimed for any other reason.

In their prayer for relief complainants asked simultaneously for a decree against the United States, setting aside the order of the Commission; also for a decree against these appellees, setting aside the sale by the "Holding Company" and Richard Fitzgerald of their shares to the New York Central; also for a decree setting aside the lease from the "Junction Company" to the "River Road"; also for the restoration to office of the former officers and directors of the "River Road"; and also for the restoration to the "Junction Company" of the railroad formerly owned and operated by it.

In the District Court the three appellees, to wit, the "Junction Company," the "Holding Company" and Richard Fitzgerald (together with all the other appellees) filed their general and special motions to dismiss, for the reasons set out therein.

Upon the hearing, the motions of all the appellees were granted and the appellants appealed.

The appellees now come here respectfully insisting—

(1) That the order of the District Court dismissing the bill as to all of the defendants should be affirmed.

(2) That, irrespective of what the court may decide as to the propriety of the order with respect to the other appellees, in any event the order of the court dismissing the bill as to these appellees should be affirmed.

In view of the fact that the other appellees, to wit, the United States, the Interstate Commerce Commission and The New York Central Railroad Company are all present in court and represented by able counsel, appellees, the "Junction Company," the "Holding Company" and Fitzgerald will endeavor (so far as possible) to confine themselves solely to the proposition that as to them, there was no error in the order of dismissal.

POINTS AND BRIEF.

I.

THE ORDER IS WHOLLY NEGATIVE AS TO THE APPELLANTS, AND MERELY PERMISSIVE AS TO THE OTHER RESPONDENTS AND THEREFORE NOT SUBJECT TO ATTACK.

Pennsylvania R. R. v. *United States Labor Board*, U. S. Sup. Ct., decided February 19, 1923.

Proctor & Gamble v. *United States*, 225 U. S. 282.

United States v. *Illinois Cent. R. R. Co.* 244 U. S. 82 (89).

II.

THE "URGENT DEFICIENCY APPROPRIATIONS ACT" DOES NOT PERMIT A SUIT TO BE BROUGHT, AND THERE IS NO LEGISLATION UNDER WHICH A SUIT MAY BE BROUGHT, SEEKING IN THE SAME ACTION—

(1) TO SET ASIDE, AS AGAINST THE UNITED STATES, AN ORDER OF THE INTERSTATE COMMERCE COMMISSION; AND

(2) GENERAL EQUITY RELIEF AGAINST DEFENDANTS OTHER THAN THE UNITED STATES.

Urgent Deficiency Appropriations Act, Sec. 1; *Commerce Court Act*, Secs. 4 and 5.

Louisiana v. *McAdoo*, 234 U. S. 627.

Ill. Cent. R. R. Co. v. *State Public Utilities Commission*, 245 U. S. 493 (503 and 505).

III.

THE APPELLANTS HAVE NO LITIGABLE INTEREST IN THE SUBJECT MATTER OR IN THE ACTS ALLEGED IN THE BILL TO HAVE BEEN PERFORMED BY THESE APPELLEES OR ANY OF THEM.

Edward Hines Yellow Pine Trustees, et al. v. *United States* (U. S. Sup. Ct.), decided November 12, 1923.

Railroad Company v. *Ellerman*, 105 U. S. 166.

Diffenbaugh v. *Union Pacific R. R. Co.* 176 Fed. 409 (modified and affirmed 222 U. S. 42).

The Golconda Northern Railway Co. v. *Gulf Lines Connecting Railroad of Illinois*, 265 Ill. 194 (citing *Railroad Co.* v. *Ellerman*, 105 U. S. 166.

The People v. *General Electric Railway Company*, 172 Ill. 129.

Many other cases in the state courts.

IV.

EVEN IF THE ALLEGED ACTS OF THE APPELLEES HAD NOT BEEN ASSENTED TO BY THE UNITED STATES THROUGH THE INTERSTATE COMMERCE COMMISSION, AND,—

EVEN IF IT BE ASSUMED THAT SUCH ACTS, WITHOUT SUCH CONSENT, WOULD BE IN VIOLATION OF THE ANTI-TRUST ACTS, NEVERTHELESS THE APPELLANTS (NOT HAVING ANY LITIGABLE INTEREST) WOULD NOT BE PERMITTED TO MAINTAIN THIS ACTION AGAINST THE APPELLEES WHO ARE NOT COMMON CARRIERS.

UNDER SUCH CIRCUMSTANCES SUCH AN ACTION COULD ONLY BE MAINTAINED BY THE UNITED STATES.

THE PROVISO TO SECTION 16 OF THE CLAYTON ACT PROHIBITS SUCH A SUIT AGAINST THE COMMON CARRIER APPELLEES.

Minnesota v. *Northern Securities Co.* 194 U. S. 48.

Paine Lumber Co. v. *Neal,* 244 U. S. 459, 471 (1916).

Duplex Printing Press Co. v. *Deering, et al.* 254 U. S. 443, 465 (1921).

Geddes v. *Anaconda Mining Co.* 254 U. S. 590, 593 (1921).

38 U. S. Stat. at Large, Ch. 38, Sec. 16.

V.

EVEN IF THE ACTS OF THE CORPORATE APPELLEES WERE ULTRA VIRES, THE APPELLANTS NOT BEING STOCKHOLDERS COULD NOT MAINTAIN THIS ACTION AGAINST THESE APPELLEES.

Railroad Company v. *Ellerman, supra.*

Peru Plow & Implement Co. v. *Harker,* 144 Fed. 673.

Belcher Sugar Refining Co. v. *St. Louis Grain Elevator Co.* 13 S. W. 822.

C. M. & G. Co. v. *C. N. G. Co.* 40 Pac. 326.

Many other decisions in the State Courts.

VI.

THE RIGHT OF ACTION GIVEN UNDER SUBDIVISION (20) OF SECTION 1 OF THE ACT TO REGULATE COMMERCE, DOES NOT OBTAIN WITH RESPECT TO ACTS AND TRANSACTIONS UNDER SUBDIVISION 2 OF SECTION 5 OF THE ACT TO REGULATE COMMERCE.

The language in subdivision (20) of Section 1 is:

"* * * any construction, operation * * * contrary to the provisions * * * of paragraphs 18 and 19 *of this section* may be enjoined * * * at the suit of * * * any party in interest."

There is no such language in Section 5.

Interstate Commerce Act, Secs. 1, 5.

ARGUMENT.

I.

THE DECREE OF THE COURT BELOW SHOULD BE AFFIRMED AS TO THESE APPELLEES BECAUSE THE ORDER OF THE INTERSTATE COMMERCE COMMISSION, BEING MERELY "NEGATIVE" AS TO THE APPELLANTS AND "PERMISSIVE" AS TO THE APPELLEES, IS NOT OPEN TO ASSAULT BY ANYONE.

The order of the Commission did not impose any duty upon The New York Central Railroad Co. to acquire the "River Road" stock, or upon the owners of the stock to sell the same. It did not impose any duty upon the "Junction Company" to lease its road to the River Road, or upon the "River Road" to acquire the same.

As was said by this court, referring to the "Labor Board Act" in *Pennsylvania Railroad Co.* v. *U. S. Labor Board*, decided February 19, 1923:

> "Under the act there is no constraint upon them (referring to the two contending parties) to do what the board decides they should do, except the moral constraint already mentioned, of publication of its decision. * * * All that we may do in this case is to hold, as we do, that they (referring to the decisions of the Labor Board) were within the lawful function of the board to render, and *not being compulsory*, violate no legal or equitable right of the complaining company."

In view of the fact, however, that this point has been elaborately argued by the United States, these appellees adopt as their own, the argument of counsel for the Government on this point and do not further elaborate the same.

See other authorities under Point I of our brief.

II.

THE DECREE OF THE COURT BELOW AS TO THESE APPELLEES SHOULD BE AFFIRMED BECAUSE UNDER THE "URGENT DEFICIENCY APPROPRIATIONS ACT" THESE APPELLEES MAY NOT BE SUED JOINTLY WITH THE UNITED STATES IN A SUIT TO SET ASIDE AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

To state the proposition is to demonstrate it.

As was said by this court in *Louisiana* v. *McAdoo*, 234 U. S. 628,—

> "No principle is better established than that the United States may not be sued in the courts of this country without its consent."

If it be true that the United States may not be sued without its consent, it necessarily follows that it is equally true that it cannot be sued jointly with third parties without its consent.

There is no such consent for such a joint suit in the *"Urgent Deficiency Appropriations Act."*

In *Illinois Central* v. *Public Utilities Commission*, 245 U. S. 493, suit was brought by the Illinois Central Railroad Company against the Public Utilities Commission of Illinois, in the Eastern Division of the Northern District of the State of Illinois. Thereupon the Commission filed a cross bill assailing certain orders of the Interstate Commerce Commission, which were supposed to be involved in the original suit, and making the United States party defendant. Later the United States was dismissed out of the case.

Referring to the cross bill which had been filed against the Commission, this court said, p. 504:

> "By statute such suits are required to be brought against the United States * * * only in designated districts. Here the Eastern District of

Missouri was the one designated. * * * The United States had consented to be sued there, but not elsewhere, and being suable only by its consent, could not be sued in the district (to wit, Illinois) within the consent given. * * *

No doubt there are situations in which a cross bill against an ordinary suitor may be considered and dealt with in virtue of the jurisdiction over the principal suit, even though as an original bill it could not be entertained. * * * But *it is otherwise* where the cross bill is against the United States, for no suit against it can be brought without its consent given by law. Its immunity recognizes no distinction between cross bills and original bills or between ancillary suits and original suits, but extends to suits of every class.

* * * The claim is made that in any event the cross bills should have been retained as to the defendants therein other than the United States, *but this is not an admissible view.* As before indicated, the United States is made by statute a necessary party to the suit to set aside an order of the Commission and this means that it is to stand in judgment as representing the public." * * *

This being the law with respect to the United States, it necessarily follows that the United States may not be sued *jointly* with other defendants *without its consent* given by law, and also that other defendants may not be sued jointly with the United States against their will *without a law to that effect.*

Section 4 of the *"Commerce Court Act"* which is incorporated into the *"Urgent Deficiency Appropriations Act"* provides—

> "that all cases * * * which but for this act, would be brought by or against the Interstate Commerce Commission, *shall be brought by or against the United States."*

Section 5 of the Act provides—

(1) That "the Attorney General shall have

charge and control of the interest of the Government in all cases * * *, etc."

(2) that "the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission *may appear* as parties and be represented by their counsel in any suit wherein is involved the validity of such order and the interest of such party." * * *

It is obvious that this provision gives the right to a third party whose interests are involved, to intervene. But it does not give the right to the complainant *to make such third party defendant against such third party's will.*

(3) Section 5 further provides that—

"Communities * * * corporations * * * who are interested in the controversy or question before the Interstate Commerce Commission * * * *may intervene in said suit.*" * * *

It is obvious that this provision also relates to the rights of third parties (communities or corporations) to voluntarily appear in the suit assailing the order, but it does not confer upon the complainant the right to join *third parties against their will,* as defendants, with the United States.

(4) Section 5 further provides that—

"complainants before the Interstate Commerce Commission shall have the right to appear and be made parties to the case," etc. * * *

but this provision does not confer the right upon any firm or corporation assailing the order of the Commission, to compel the complainants or any party other than the United States to appear before the Commission against such party's will.

The act provides that persons desiring to attack the Commission must sue the United States. *It does not confer upon such litigants the right to institute general equity actions seeking general equity relief against other defendants.*

Nevertheless, that is the relief which the appellants in the case at bar have sought against the appellees, the "Holding Company," the "Junction Company" and Richard Fitzgerald.

In view of the fact that the bill does not predicate any jurisdiction upon the subject matter, or parties thereto, except under the *"Urgent Deficiency Appropriations Act"*; and in view of the fact that even if it did, the bill upon its face shows that it is a suit, among other things, brought by citizens of the States of Indiana, Michigan and Pennsylvania against a citizen of the State of Pennsylvania and Indiana, it is evident that even if an attempt were made to predicate the bill upon diversity of citizenship, that by its own terms it must fail.

These appellees, therefore, respectfully submit that even if this court should hold that the order of the Commission is an assailable order, and that the bill may be maintained by the appellants against the United States, under the provisions of the *"Urgent Deficiency Appropriations Act,"* it must, nevertheless, be dismissed as to these appellees and the order in that respect should be affirmed for want of jurisdiction.

III.

EVEN IF THE COURT SHOULD HOLD THAT THE ORDER ENTERED BY THE INTERSTATE COMMERCE COMMISSION IS A LITIGABLE ORDER AND THAT THERE IS NO MISJOINDER OF PARTIES, NEVERTHELESS, THE ORDER OF THE COURT BELOW SHOULD BE AFFIRMED AS TO ALL OF THE APPELLEES BECAUSE THE APPELLANTS HAVE NO LITIGABLE INTEREST AS AGAINST THE UNITED STATES.

The real grievance which led the appellants to file their bill of complaint in the District Court appears in paragraph XII of the bill as amended. (Rec., 53.) This paragraph reads as follows:

> "'Plaintiffs further show that the River Road and the Junction, on May 15, 1922, were, and prior to that date always had been, neutral belt railroads uncontrolled by any trunk line carrier and as such were used by all railroads entering Chicago, impartially and without discrimination; that prior to May 16, 1922, the plaintiffs herein competed for traffic originating at points of origin on, or destined to points of delivery on, the said River Road and the Junction on equal terms with the Central without either the plaintiffs or the Central having any advantage in the securing of said traffic by reason of having an ownership or control of the said River Road and/or the said Junction; that the acquisition of control approved and authorized by the Commission in its order of May 16, 1922, substitutes monopoly of control and operation for the neutral control and operation of the Junction and River Roads which prior to May 16, 1922, served alike all railroads reaching Chicago, including the plaintiffs herein and the Central; that practically all of the tonnage originating at or destined to points on the Junction and the River Roads is competitive tonnage in that the same could be hauled either over the lines of railroad constituent parts of the New York Central System or over the lines of one or more of your plaintiffs; that the control of a belt

line by one line-haul carrier gives that line-haul carrier substantial advantages in the securing of competitive tonnage to the consequent disadvantage of competing line-haul carriers not having such control; that in cases where the shippers on the River Road and the Junction have failed to direct the route of movement of their shipments consigned to points which are served by the Central or by lines of railroad constituent parts of the New York Central System, directly or through its or their connections, as well as by the plaintiffs herein, directly [fols. 107 & 108] or by their connections, it is and since May 16, 1922, has been the practice of the officials, agents and employes of the River Road and the Junction to route said shipments via the line of the Central and via the lines of carriers constituent parts of the New York Central System to the exclusion of routing any of said shipments via the lines of the plaintiffs herein; that the acquisition of control approved and authorized by the Commission in its said order has curtailed, and so long as it continues to exist, will, greatly curtail the ability of the plaintiffs to secure the competitive traffic of shippers located upon the lines of the Junction and the River Road for the reason that subsequent to May 16, 1922, it has been, now is, and will be the practice of shippers located on the said railroads to give preference to cars of the Central (which, under the order complained of, has the control of the said roads) to the exclusion of cars of the plaintiffs, its competitors, and to route their shipments via the line of the Central and via the lines of railroad constituent parts of the New York Central System in lieu of routing said shipments via the lines of the plaintiffs herein; that the diversion of tonnage from the rails of the plaintiffs to the rails of the Central or other routes of the New York Central System, consequent upon the facts above related has resulted in a large loss of traffic and of revenue to the plaintiffs, to their irreparable loss and injury, in an amount exceeding $10,000,000; and that the loss in net earnings to plaintiffs which will result from the continued control acquired under the said order of the Commission will approximate $10,000,000 per annum so long as said control continues."

Of course, in making the foregoing allegations, the complainants entirely overlook the conditions upon which the purchases were allowed by the Interstate Commerce Commission. (Rec., 22-23.)

> "*Condition* 1 *is as follows:* The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located in Chicago in order to preserve for the shipper the present direct access to the railroad officials.
>
> *Condition* 2 *is as follows:* The present neutrality of handling traffic in and outbound by the Junction and River Road organization shall be continued so as to permit equal opportunity for service to and from all trunk lines reaching Junction rails, without discrimination as to routing or movement of traffic which is competitive with the traffic of the Central, and without discrimination against such competitive traffic in the arrangement of schedules.
>
> *Condition* 3 *is as follows:* The present traffic and operating relationships existing between the Junction and River Road and *all carriers* operating in Chicago shall be continued, in so far as such matters are within the control of the Central.
>
> *Condition* 7 *is as follows:* The Junction shall accept, handle and deliver all cars in and outbound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement."

These obligations imposed upon the New York Central are incorporated in the record and leave paragraph 12 of the bill of complaint shorn of such little, if any, legal weight or effect as it had.

But let us suppose that the conditions contained in the Commission's order did not appear in the record. Even in such an event paragraph 12 of the bill of complaint

as amended, stripped of all superfluous verbiage, means merely that the complainants complain because:

> "by the far-sightedness of the New York Central, they (the complainants) will find competition with the New York Central more difficult than they have hitherto found it."

They do not contain a single averment showing *any interference* by the New York Central with any *legal* right which the complainants, or any of them, have or had.

Were it not for the language of this court in *Edward Hines Lumber Co., supra,* it might be permissible (even if not necessary), to develop this point further and to point out that, so far as the rights, if any, of the appellants as carriers are concerned over traffic originating on the rails of the Junction Company; those rights are amply protected by other provisions of the Interstate Commerce Act. 3 *and* 4. *Section* 3 *Interstate Commerce Act.*

However, in view of the language used by this court in the *Hines* case *supra,* the appellees respectfully submit that an elaboration of these points is wholly unnecessary.

In the *Hines* case this court said:

> "But the plaintiffs could not maintain this suit merely by showing (if true) that the Commission (the Interstate Commerce Commission) was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to *legal injury,* actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges, and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. *Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed, may conceivably have subjected*

plaintiffs to such losses as are incident to more effective competition. * * *

The further claims of the plaintiffs are, if possible, even more unsubstantial. They fear that, by reason of the order, they may, in the future, suffer in times of car shortage through the greater use of cars for storage. They fear that the equipment to be used in connection with the railroad which they expect to operate may be diverted, at some time in the future, from transportation uses. If their fears are realized, it will be open to them to apply to the Commission for relief. As the plaintiffs do not show any interest which entitles them to sue, we have no occasion to consider either the power of carriers to impose the penalty charge, or the power of the Commission to order its cancellation."

In *Diffenbaugh* v. *Union Pacific R. R. Co.* 176 Fed. 409 (417), in discussing the nature of the "interest" which a party must have in order to attack an order of the Interstate Commerce Commission, Judges Sanborn, Hook and Adams said:

"The determination of the question what parties may maintain such suits is left by the Interstate Commerce Act to the general rules and practice in equity, and under them any party whose *rights of property* are in danger of *irreparable injury from an* unauthorized order of the Commission may appeal to a federal court of equity for relief."

This language of the circuit judges was adopted by this court in its opinion in *222 U. S. 42*, where, with respect to the foregoing language of the circuit judges, this court said:

"The jurisdiction in the *Diffenbaugh* case was doubted. * * * We are content to leave that matter *on the statement of the court below.*"

In *Railroad Company* v. *Ellerman*, 105 U. S. 166, *supra*, Ellerman entered into a contract with the City of New Orleans by which the latter granted to him for a

term of years certain rights with respect to the city's wharves and levees.

Defendants were by contract permitting third parties to conduct a wharf on the property of the defendants without, as Ellerman claimed, any franchise right so to do and in violation (as Ellerman claimed) of Ellerman's grant from the city. Thus the attack made by Ellerman was twofold—

First. That the defendants had no lawful right to do what they were doing.

Second. That what the defendants were doing was a violation of Ellerman's right and resulted in the conduct of a business which was in competition with a business conducted by him under his grant from the city.

The Circuit Court of the United States granted a decree in his favor. In reversing it this court said:

> "The sole remaining question then, is, whether Ellerman, as assignee of the city, has any legal interest which entitles him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, *but on the allegation merely that such use is beyond the corporate powers of the company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting ultra vires. The damage is attributable to the competition, and to that alone. But the competition is not illegal.* It is not unlawful for anyone to compete

with the company, although the latter may not be authorized to engage in the same business. The *legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty.* A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. *The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right.* If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed." (Italics are ours.)

In *Golconda Northern Railway Company* v. *Gulf Lines Connecting Railroad of Illinois,* 265 Ill. 194, a controversy arose between two railroad companies with respect to the construction and the operation of a railroad through a narrow pass.

The Golconda Company, claiming to be in possession of the pass, filed a bill for an injunction to restrain the Gulf Lines Connecting Company from interfering with, obstructing or hindering the former in the construction of its road. The lower court entered a decree dismissing the bill. In affirming the decree the Supreme Court of Illinois said, at pages 205 and 206:

"The appellant has no such interest as entitled

it to enjoin the appellee from constructing a railroad in this pass. The only injury of which it can complain in a judicial tribunal is the invasion of some legal or equitable rights. It alleges that the appellee is acting beyond its authority under the law because the conveyance under which it claims was beyond the charter power of its grantor to make. This conveyance, however, did not injuriously affect any right of the appellant, and it has, therefore, no ground to complain. *Neither the Toledo, St. Louis and New Orleans Railroad Company nor the appellee owed any duty to the appellant in regard to this land or to the title thereto. A stockholder in the grantor company might have an interest in restraining it within the limits of its corporate powers and the State might have an interest in preventing the usurpation and perversion of its franchises, but the appellant has no interest in these questions and cannot raise them to enable it to seize the property* which is the real subject matter of the controversy. (Citing *New Orleans, Mobile & Texas Ry. Co.* v. *Ellerman*, 105 U. S. 166.)" (Italics are ours.)

IV.

IRRESPECTIVE OF THE DECISION OF THIS COURT AS TO ANY OTHER POINTS IN THE CASE, THE DECREE OF THE COURT BELOW IN FAVOR OF THESE APPELLEES MUST BE AFFIRMED BECAUSE, AS AGAINST THESE APPELLEES, THE APPELLANTS HAVE NO LITIGABLE INTEREST WHATSOEVER.

(1)

A discussion of this proposition necessarily involves an analysis of the difference between the scope of Subdivision (2) of Section 5 and of Subdivision (18) of Section 1 of the Act to Regulate Commerce.

Subdivision (2) of Section 5 refers to the acquisition "to the extent indicated by the Commission" by one carrier of another (both being already in existence), either by—

(a) the purchase of stock, or

(b) under a lease, and not otherwise.

Subdivision (18) of Section 1 apparently refers to the acquisition or construction by one carrier of a "new line of railroad." In any event it has nothing to do with the acquisition by lease or stock ownership of one carrier by another referred to in subdivision (2) of Section 5 or to the consolidation by other methods provided for in subdivision (6) of Section 5.

In the case at bar the Commission gave its approval to the acquisition by the New York Central of the stock of the "River Road" and of a lease of the "Junction Company," pursuant to the provisions of Subdivision (2) of Section 5.

By getting this order the New York Central also obtained the immunity provided for in subdivision (8) of Section 5 which is as follows:

> "The carriers affected by any order made under the foregoing provisions of this section * * *

> shall be • • • relieved from the operation of the Anti-Trust Laws • • • and of all other restraints or prohibitions by law, state or federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."

However—to put the proposition for which the appellees are now contending in its most acute form—*let us suppose that the New York Central had acquired the stock of the "River Road" and the latter had acquired the lease of the "Junction Company" without the consent of the Interstate Commerce Commission.*

What then would have been the rights of the appellants to maintain this action as against the appellees?

It is respectfully submitted that they would have had no rights whatsoever.

Even under the Clayton Act, the right to enforce prohibitions of the anti-trust act against private parties is not vested in private parties unless some litigable interest of the latter is affected by the alleged violation.

Under such circumstances it rests only in the United States.

> (*See authorities cited under Points III-IV, supra.*)

As to common carriers, it is expressly provided in the proviso to Section 16 of the Clayton Act that no suit may be maintained against them.

> (*See 38 Stat. at Lar., ch. 38, p. 737, proviso to Section 16.*)

This question is so well settled as to need no further consideration here.

(2)

So far as state legislation is concerned, acquisition by the New York Central of the stock and by the "River Road" of the lease at the worst would have been only ultra vires the corporations.

No claim is made by the appellants that the acquisition of the stock and of the lease aforesaid was *ultra vires* the corporations under State legislation. As a matter of fact, such a claim, if made, would have been wholly without foundation. The statutes of the State of Illinois, under which the New York Central, the "Junction Company" and the "River Road" are organized, contain ample authority for the acquisition of the stock and lease aforesaid.

However—to again put the proposition in its most acute form and in the form most favorable to the appellants—let us suppose that the acquisition by The New York Central was *ultra vires* under the laws of the states under which The New York Central and the "River Road" and the "Junction Company" had been organized.

The law is well settled that no one can raise the question of *ultra vires* except either the state or a stockholder.

As was said in *Ellerman* v. *R. R. Co. supra,* p. 173:

> "The *legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty.* A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a

trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The Company is not shown to owe him any duty which it has not performed." (Italics are ours.)

In *Peru Power Improvement Co.* v. *Harker* (C. C. A.) 144 Fed. 673, the Circuit Court of Appeals, referring to *ultra vires* transactions, said:

"But an executed contract or conveyance is not open to collateral attack by strangers to it, upon the ground that a corporation which is a party to it was without power to make or to accept it. It may be successfully questioned by no one *but the state and those who are parties or privies to it.* (*Citing cases.*)"

In *Belcher Sugar Refining Co.* v. *St. Louis Grain Elevator Co.* (Mo.) 13 S. W. 822, the court, referring to an *ultra vires* transaction, said:

"The defendant's *stockholders and the state may* complain but the *plaintiff cannot base a cause* of action alone on any such ground. He must show that some duty owing to him is being violated before he can maintain this suit because the defendant is exceeding its charter powers. (*Citing Railroad* v. *Ellerman,* 105 U. S. 166.)"

As was said in *Coffeyville Mining & Gas Company* v. *Citizens' Natural Gas Company, supra,* 40 Pac. 326:

"A private person or corporation will not be recognized in a court of justice as the guardian of purely public interests, nor to further its private

ends by assuming that character." (Citing authorities.)

Many other state court decisions are to the same effect.

But the appellants do not even sue as stockholders. They assert no right predicated on such relationship either as to the New York Central or the "River Road" or the "Junction Company."

Neither have they asserted any right whatever with respect to the shares of stock owned by the appellee, Fitzgerald, as an individual.

As the result of these considerations the appellees submit—

(a) That while it was an undoubted advantage to The New York Central to obtain the approval of the Interstate Commerce Commission, nevertheless their failure to get such approval would not have vested any right in the appellants, under federal legislation, to assail the transaction even if consummated without such assent.

(b) Again—if consummated without such assent—the appellants, not being stockholders, would not have had the right to maintain the action even if the acquisition by The New York Central had been *ultra vires* under the laws of the states where it and the "Junction Company" and the "River Road" were organized.

(c) It therefore follows that the appellants cannot maintain the action against the appellees the "Holding Company," the "Junction Company" and Fitzgerald.

V.

CONCLUSION.

As a resumé: The appellees submit that the order dismissing the bill of complaint of the appellants as to these appellees must be affirmed for the following reasons:

1. The order of the Interstate Commerce Commission is a nonassailable order.

2. The appellees, the "Holding Company," the "Junction Company," and Fitzgerald cannot be sued jointly with the United States under the *"Urgent Deficiency Appropriations Act."*

3. If the order of the Commission is a litigable order, the appellants do not have a litigable interest even as against the United States.

4. In any event, the appellants have no litigable interest which they may assert in this proceeding against the "Holding Company," the "Junction Company" and Richard Fitzgerald.

Respectfully submitted,

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THE CHICAGO JUNCTION CASE.[1]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 489. Argued January 24, 1924.—Decided March 3, 1924.

1. An order of the Interstate Commerce Commission permitting one carrier to acquire control of another, made under par. 2 of § 5 of the amended Act to Regulate Commerce, which allows this whenever the Commission is of opinion, after hearing, that the acquisition will be in the public interest, is subject to judicial review. P. 263.
2. Such an order is void if the finding that the acquisition will be in the public interest is made without supporting evidence. P. 265.
3. Facts conceivably known to the Commission but not put in evidence will not support an order. P. 263.
4. In a bill to set aside such an order, an allegation that such finding was wholly unsupported by evidence charges a fact which must be taken as admitted on appeal from a decree dismissing the bill on motion equivalent to a demurrer. P. 262.
5. Carriers which suffer serious disadvantage, prejudice and loss of traffic from the transfer of neutral terminal railroads to the control of a competitor, and which intervened unsuccessfully before the Commission in opposition to such transfer, have a standing to attack the order permitting it, upon the ground that there was no evidence to support the finding of public interest on which the order was based. P. 266.
6. Section 212, Jud. Code, which declares that any party to a proceeding before the Interstate Commerce Commission may, as of

[1] The docket title of this case is: *Baltimore & Ohio Railroad Company et al.* v. *United States, Interstate Commerce Commission, New York Central Railroad Company, et al.*

right, become a party to any suit wherein is involved the validity of its order, impliedly authorizes one who was permitted to oppose an order before the Commission by intervention, to institute a suit to challenge it. P. 267.

7. Under the Act of October 22, 1913, a suit may be brought to set aside an order of the Commission and also to restore the *status quo ante*, by joining with the United States private parties who appeared before the Commission and have acquired rights under the order. P. 269.

Reversed.

APPEAL from a decree of the District Court denying an interlocutory injunction and dismissing the bill, on motion, in a suit to set aside an order of the Interstate Commerce Commission.

Mr. Luther M. Walter, with whom *Mr. John S. Burchmore* was on the brief, for appellants.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. Attorney General Daugherty* and *Mr. Solicitor General Beck* were on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Ralph M. Shaw, with whom *Mr. Silas H. Strawn*, *Mr. Guy Currier* and *Mr. Frederick C. Hack* were on the brief, for Chicago Junction Railway Company et al., appellees.

Mr. Robert J. Cary filed a brief on behalf of New York Central Railroad Company and Chicago River & Indiana Railroad Company, appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Chicago Junction Railway and the Chicago River and Indiana Railroad are terminal railroads located

within the Chicago switching district. Prior to May 16, 1922, they were operated as independent belt-lines, uncontrolled by any trunk line carrier; and they were used by the twenty-three railroads entering Chicago, impartially and without discrimination. Among these were the New York Central Lines and their chief competitors, the six carriers who are plaintiffs in this suit.[1] The New York Central sought to obtain control of these terminal railroads. To this end, it made an application to the Interstate Commerce Commission, on December 28, 1920, under paragraph 18 of § 1 and paragraph 2 of § 5 of the Act to Regulate Commerce as amended by Transportation Act, 1920, c. 91, 41 Stat. 456, 477, 481.[2] The authorization requested was to make an agreement with stockholders then owning these properties by which, among other things, the New York Central would purchase all the capital stock of the Chicago River and Indiana Railroad for $750,000; and the latter company would lease for 99 years (and thereafter) the Chicago Junction Railway at an annual rental of $2,000,000. Upon this application hearings were had. The Baltimore and Ohio Railroad, and its co-plaintiffs herein, intervened, and opposed granting the application. On May 16, 1922, an order was entered which authorized the New York Central to acquire the Chicago River and Indiana Railroad stock;

[1] The Baltimore & Ohio, the Pennsylvania, the Chicago & Erie, the Grand Trunk Western, the Chicago, Indianapolis & Louisville, and the Pittsburg, Cincinnati, Chicago & St. Louis. The Wabash, originally joined as plaintiff, was dismissed on its own motion.

[2] Neither of the operating companies affected joined in the application of the New York Central; and no separate application to the Commission was filed by either of them. But they were represented before the Commission; and the petition of the New York Central prayed that the several corporations involved be authorized to sell and to buy such stock, and to execute such lease; and that the Commission "issue in respect thereof its certificate of public convenience and necessity."

and authorized the latter company to lease the Chicago Junction Railway.[3] *Chicago Junction Case*, 71 I. C. C. 631. The order did not fix the date when it should become effective.[4] Immediately after its entry, the purchase of the stock was completed and the lease was executed.

On April 10, 1923, this suit was brought in the federal court for the Northern District of Illinois against the United States, the Commission, the New York Central, the terminal railroads and the stockholders thereof.[5] The relief sought is to have the order declared void; to have

[3] The report entitled "By the Commission," states that the authority is granted subject only to the observance of seventeen conditions which it enumerates. Applications under paragraph 18 of § 1 and paragraph 2 of § 5 are customarily heard by Division 4 consisting of four commissioners. See Interstate Commerce Act, § 17; Annual Report of the Commission for 1920, pp. 3–6. But this case was heard by the full Commission. The Commission consists of eleven members. Only four concurred entirely in what is called the Report of the Commission. Four others dissented wholly. One "concurred in part" declaring that the "facts warrant grant of authority without elaboration of conditions" which (with two exceptions) seemed to him "vain, perhaps harmful." The two other members concurred "in the result reached in the report," but declared that the opinion "should recognize explicitly that the application should have been entertained under section 1, paragraph 18, of the act; and that in accordance therewith a certificate of public convenience and necessity should be incorporated in the order entered."

[4] On May 29, 1922, the intervening carriers filed a petition praying that the order be set aside or modified. The petition was denied June 12, 1922.

[5] The agreement of the New York Central was with the Chicago Junction Railways and Union Stock Yards Company, a holding company, which owned all the stock in the Chicago River and Indiana Railroad and half of the stock in the Chicago Junction Railway; the other half being owned by Richard Fitzgerald, who wished to join in making the sale transferring control. The property to be leased included the railroad of the Union Stock Yards and Transit Company of Chicago, which had theretofore been leased to the Chicago Junction Railway.

set aside the sale of the stock and the lease; to restore the *status quo ante* the order; and for an injunction. The case was heard before three judges on plaintiffs' motion for an interlocutory injunction and on defendants' motions to dismiss the bill.[6] The District Court, without opinion, denied the injunction and dismissed the bill. The case is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

The order did not provide for the issue of a certificate of public convenience and necessity. It did not disclose whether it was issued under paragraph 18 of § 1 or under paragraph 2 of § 5. An application, by the carriers who are plaintiffs herein, that this be specified was denied by the Commission without opinion. In this Court counsel for all the defendants stated that the order was entered solely under paragraph 2 of § 5. We have, therefore, no occasion to consider the incidents of applications under paragraph 18 of § 1, or rights thereunder. Several reasons are urged why the order should be held void. The defendants, besides asserting its validity, insist that the plaintiffs have no interest which entitles them to assail the order; and that there are, also, other obstacles to the maintenance of this suit.

First. Plaintiffs contend that the order is void because there was no evidence to support the finding that the acquisition of control of the terminal railroads by the New York Central "will be in the public interest." The bill charges, in clear and definite terms, that this finding was wholly unsupported by evidence. We must take that fact as admitted for the purposes of this appeal. The allega-

[6] When the cause was heard on the original bill the hearing was upon motions to dismiss filed by the United States, the New York Central, the Chicago River and Indiana Railroad, the Chicago Junction Railways and Union Stock Yards Company, the Chicago Junction Railway and Richard Fitzgerald; and upon the answer of the Interstate Commerce Commission. The bill was then amended. Thereupon, the case was heard solely on the motions to dismiss.

tion is made as one of fact. There is no suggestion in the motions to dismiss (which are both general and special) that this fact is not well pleaded; or that a copy of the evidence introduced at the hearing should have been annexed to the bill. Compare *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114. Facts conceivably known to the Commission but not put in evidence will not support an order. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93. The defendants concede that the New York Central could not legally acquire control of these terminal railroads unless authorized so to do by the Commission pursuant to paragraph 2 of § 5; and that the Commission cannot legally grant such authority unless it finds, after hearing, that the acquisition "will be in the public interest." They contend that this order is not one of those subject to judicial review; and that, if subject to review, it cannot be held void merely because unsupported by evidence. These objections are based on the nature of the order, not on the class of persons by whom the judicial review is invoked.

Whether this order can be described properly as legislative, may be doubted. It is clear that legislative character alone would not preclude judicial review. Rate orders are clearly legislative. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226. Nor would the further fact that the order is permissive preclude review, if by that term is meant an order which, in contradistinction to one compelling performance, authorizes a carrier to do some act otherwise prohibited. Orders entered under the Act of June 18, 1910, c. 309, 36 Stat. 539, 547, amending § 4 of the Interstate Commerce Act, are of this character. That section prohibits carriers from charging more "for a shorter than for a longer distance over the same line or route in the same direction" without obtaining authority from the Commission. A suit will lie to set aside an order granting such authority, and to enjoin action by the carrier there-

under. *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562. Compare *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U. S. 178. The order here challenged is wholly unlike those which have been held not subject to judicial review. In *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82, 89, the action of the Commission, with which the Court refused to interfere, was the assignment of a complaint for hearing. As this Court said: "The notice . . . had no characteristic of an order, affirmative or negative." In *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Hooker* v. *Knapp*, 225 U. S. 302; and *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412, judicial review was refused, not because the order was permissive, or because it was negative in character, but because it was a denial of the affirmative relief sought.[7] This Court declined to interfere, because to do so would have involved exercise by it of the administrative function of granting the relief which the Commission, in the exercise of its jurisdiction, had denied. Here the order complained of is an affirmative one. That is, it grants the relief sought. Compare *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 483.

It is further contended that paragraph 2 of § 5 confers a power purely discretionary, and that, for this reason, the order entered cannot be set aside by a court merely on the ground that the action taken was based on facts erroneously assumed, or of which there was no evidence.[8] The power here challenged is not of that character. Con-

[7] Compare *Interstate Commerce Commission* v. *Waste Merchants Assn.*, 260 U. S. 32. The mandamus was granted in *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474, and *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, because the Commission erroneously refused to assume jurisdiction. See also *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission*, 252 U. S. 178.

[8] Compare *Martin* v. *Mott*, 12 Wheat. 19, 29–33; *Philadelphia & Trenton R. R. Co.* v. *Stimpson*, 14 Pet. 448, 458.

gress by using the phrase "whenever the Commission is of opinion, after hearing," prescribed quasi-judicial action.[9] Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing.[10] The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion

[9] The same phrase is used in the Interstate Commerce Act in respect to many other classes of orders. These orders, so far as considered by this Court, have uniformly been held to be subject to judicial review; and where an essential finding was unsupported by evidence, the order was declared to be void. (1) Unreasonable rates, § 15, par. 1; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91; *Florida East Coast Ry. Co.* v. *United States*, 234 U. S. 167, 185. (2) Discriminatory rates, § 15, par. 1; compare *New York* v. *United States*, 257 U. S. 591, 600. (3) Switching connections, § 1, par. 9; *United States* v. *Baltimore & Ohio Southwestern R. R. Co.*, 226 U. S. 14. (4) Division of joint rates, § 15, par. 6; compare *New England Divisions Case*, 261 U. S. 184, 203. (5) Pooling, § 5, par. 1. (6) Railroad control of water carriers, § 5, par. 10. (7) Valuation, § 19*a*, par. Fifth *i*.

[10] Transportation Act, 1920, like the original Act to Regulate Commerce and earlier amendments, distinguished, by the language used and, also, in other respects, between those orders which can be made only after hearing and those as to which no hearing is required. Thus, orders on applications for extension of line, for new construction, or for abandonment under § 1, pars. 18-20, can be made only after hearing. But in the case of applications concerning the issue of securities under § 20a, par. 6, the Commission may hold hearings "if it sees fit." See *Miller* v. *United States*, 277 Fed. 95. And under the emergency provisions, § 1, pars. 15 and 16, and § 15, par. 4, the order may be issued without a hearing, but "terms" are fixed after "subsequent hearings." *Peoria & Pekin Union Ry. Co.* v. *United States*, 263 U. S. 528.

to consider the other grounds of invalidity asserted by plaintiffs.

Second. The defendants contend that the plaintiffs have not the legal interest necessary to entitle them to challenge the order. That they have in fact a vital interest is admitted. They are the competitors of the New York Central. Practically all the tonnage originated at or destined to points on these terminal railroads is competitive, in that the same can be hauled either over the lines of the New York Central or over those of the plaintiffs. Prior to the date of the order, and while the terminal railroads were uncontrolled by any trunk line carrier, they were all served impartially and without discrimination; and they competed for the traffic on equal terms. The order substitutes for neutral control of the terminal railroads, monopoly of control in the New York Central; and, in so doing, necessarily gives to it substantial advantage over all its competitors and subjects the latter to serious disadvantage and prejudice. The main purpose of the acquisition by the New York Central was to secure a larger share of the Chicago business. By means of the preferential position incident to the control of these terminal railroads, it planned to obtain traffic theretofore enjoyed by its competitors. Because such was the purpose of the New York Central control, and would necessarily be its effect, these plaintiffs intervened before the Commission. That their apprehensions were well founded is shown by the results. The plaintiffs are no longer permitted to compete with the New York Central on equal terms. A large volume of traffic has been diverted from their lines to those of the New York Central. The diversion of traffic has already subjected the plaintiffs to irreparable injury. The loss sustained exceeds $10,000,000. Continued control by the New York Central will subject them to an annual loss in net earnings of approximately that amount. If, as suggested in *Interstate Commerce Commission* v.

Chicago, Rock Island & Pacific Ry. Co., 218 U. S. 88, 109, a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here.

This loss is not the incident of more effective competition. Compare *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 148. It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper. *Pennsylvania Co.* v. *United States*, 236 U. S. 351. It is true that, before Transportation Act, 1920, the Interstate Commerce Act would not have prohibited the owners of the terminal railroads from selling them to the New York Central. Nor would it have prohibited the latter company from making the purchase. And, by reason of a provision then contained in § 3 of the Interstate Commerce Act, the purchase might have enabled the New York Central to exclude all other carriers from use of the terminals. Compare *Louisville & Nashville R. R. Co.* v. *United States*, 242 U. S. 60; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482. But Transportation Act, 1920 repealed that provision in § 3; it made provision for securing joint use of terminals; and it prohibited any acquisition of a railroad by a carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company.

The plaintiffs may challenge the order because they are parties to it. The Judicial Code, § 212 (originally the Commerce Court Act, June 18, 1910, c. 309, 36 Stat. 542,) declares that any party to a proceeding before the Commission may, as of right, become a party to "any suit wherein is involved the validity of such order." The section does not in terms provide that such party may insti-

tute a suit to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order. Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. In the proceeding before the Commission, they opposed by evidence and argument the granting of the application. This they did as of right. For under the rules of practice, adopted by the Commission pursuant to paragraph 1 of § 17 of the Interstate Commerce Act, the intervener becomes a party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel.[11] The intervention must be preceded by an order of the Commission granting leave; and leave can be granted only to one showing interest. No case has been found in which either this Court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the Commission but did not do so, have been allowed to maintain such suits where the requisite interest was shown. *Interstate Commerce Com-*

[11] Rules of Practice (1923) pp. 2, 27, 28. The Commission, like courts, distinguishes between those who are permitted to intervene, and thus become parties, and persons who are merely permitted to be heard. See *Hurlburt* v. *Lake Shore & Michigan Southern Ry. Co.*, 2 I. C. C. 122, 125. Compare *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578.

Leave to intervene can be granted only to one entitled under the act to complain to the Commission. The right to complain was broadly bestowed by Congress. Act of February 4, 1887, c. 104, § 13, 24 Stat. 379, 383, as amended June 18, 1910, c. 309, § 11, 36 Stat. 539, 550, 557. From its inception, the Commission has construed liberally this right to complain. See *Boston & Albany R. R. Co.* v. *Boston & Lowell R. R. Co.*, 1 I. C. C. 158, 173, 174; *In re Chicago, St. Paul & Kansas City Ry. Co.*, 2 I. C. C. 231, 235.

mission v. *Diffenbaugh*, 222 U. S. 42, 49; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562.[12]

Third. It is contended that this bill was properly dismissed for want of jurisdiction, at least as to the terminal companies and their stockholders other than the New York Central, because the plaintiffs have joined with the suit to set aside the order, a suit to restore the *status quo*. The objection is not that the bill is multifarious, or that it is otherwise in conflict with established equity practice. The argument is that the United States is a necessary party; that, against it, suit can be brought only when Congress gives consent; that the suit was brought necessarily and solely under the Act of October 22, 1913, c. 32, 38 Stat. 219, 220; and that the consent so given does not extend to a suit in which it is sought to set aside both the order and rights acquired by private persons thereunder. There is nothing in the legislation to indicate that Congress intended such a limitation of the scope of the relief

[12] The order involved in the latter case—relief from the operation of the Fourth Section—resembles in character that here in question. See also *Nashville Grain Exchange* v. *United States*, 191 Fed. 37; *Atlantic Coast Line R. Co.* v. *Interstate Commerce Commission*, 194 Fed. 449; *Merchants' & Manufacturers' Traffic Association* v. *United States*, 231 Fed. 292; *McLean Lumber Co.* v. *United States*, 237 Fed. 460; *City of New York* v. *United States*, 272 Fed. 768, 769; *Village of Hubbard* v. *United States*, 278 Fed. 754, 759; *Tennessee* v. *United States*, 284 Fed. 371, s. c., *Nashville, etc. Ry.* v. *Tennessee*, 262 U. S. 318; *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 Fed. 540, 548.

In *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 147, 148, the bill was dismissed because it failed to disclose any interest in the plaintiff. Cases like *Railroad Co.* v. *Ellerman*, 105 U. S. 166, which are not brought under the Interstate Commerce Act, have no bearing on the question here presented. The contention that under the principle applied in *Muskrat* v. *United States*, 219 U. S. 346, Congress was without power to confer upon persons situated like the plaintiffs the right to challenge in the courts the validity of the order is unsound.

to be afforded. The sale of the stock and the lease, which it is sought to set aside, were made immediately after entry of the order; that is, before expiration of the thirty days provided by paragraph 2 of § 15; and before the plaintiffs' petition to set aside or modify the order had been disposed of. To permit the joinder objected to could not prejudice the United States. To prohibit the joinder would, in large measure, defeat the very purpose of the bill and would clearly prevent that expedition in affording relief which it was the purpose of Congress to ensure. Act of February 11, 1903, c. 544, 32 Stat. 823. Moreover, the terminal companies, and the stockholders affected, were entitled to intervene as parties in the proceedings before the Commission; and they appeared by counsel. If they became parties to the proceeding before the Commission, they were entitled, under § 212 of the Judicial Code, to become parties, also, to any suit brought to set aside the order. It was the policy of Congress to allow persons so situated to be joined in suits to enforce provisions of the Interstate Commerce Act. See Act of February 19, 1903, c. 708, § 2, 32 Stat. 847, 848. If this suit had been brought by the United States, the court could have given the complete relief prayed for. *United States* v. *Union Pacific Ry. Co.*, 160 U. S. 1, 50; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 96. The same rule should apply where the suit to set aside the order is brought by a private party.[18]

The contention that the suit is barred by laches is clearly unfounded. The situation of none of the defendants appears to have been affected by the brief lapse of time. Compare *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 240; *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 488.

Reversed.

[18] There is nothing to the contrary in *Illinois Central R. R. Co.* v. *State Public Utilities Commission*, 245 U. S. 493; *Oregon* v. *Hitchcock*, 202 U. S. 69; or *Minnesota* v. *Hitchcock*, 185 U. S. 373.

MR. JUSTICE SUTHERLAND, dissenting.

I think the injuries alleged to have been sustained by complainants are not such as to afford the basis for a legal remedy. Complainants are interested only in the sense that the acquisition of the rights here in question by their competitor will enable the latter to absorb a larger share of the business. That is not enough to constitute a remediable interest.

Before Transportation Act, 1920, the New York Central would have been free to acquire these terminals without the consent of the Commission. If it had done so, its gain of business with the resulting loss to complainants would have been the same; but it would be inadmissible to assert that complainants might have maintained a suit to annul or enjoin the acquisition on the ground of that injury. "The effort of a carrier to obtain more business . . . proceeds from the motive of self-interest which is recognized as legitimate." *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 523. See *Johnson* v. *Hitchcock*, 15 Johns. (N. Y.) 185.

It is claimed, however, that Transportation Act, 1920, so alters the rule as to give a right of action to complainants where none existed before. I am unable to perceive any sound basis for the conclusion. That act, so far as this question is concerned, requires the carrier, as a prerequisite to an acquisition of the character here under consideration, to secure the authorization of the Commission, which that body may grant if "it will be in the public interest." The mere effect of such acquisition upon the business of competing lines is no more to be considered since the Act of 1920 than it was prior to the passage thereof. It is the public, not private, interest which is to be considered.

The complainants have no standing to vindicate the rights of the public, but only to protect and enforce their

own rights. Redress for public grievances must be sought by public agents, not by private intervention. *Home Telephone Co.* v. *Railroad Commission,* 174 Mich. 219. The right of the complainants to sue, therefore, cannot rest upon the alleged violation of a public interest, but must rest upon some distinct grievance of their own. Loss of business, or of opportunities to get business, attributable to the activity or increase of facilities on the part of a competitor is not enough. Transportation Act, 1920, lays down no new or additional rule by which the question, What constitutes a legal or equitable right, interference with which may give rise to an action? may be tested; and the determination of that question must still rest upon general principles of jurisprudence. See *Peavey & Co.* v. *Union Pacific R. Co.*, 176 Fed. 409, 417. In *Railroad Co.* v. *Ellerman,* 105 U. S. 166, 174, this Court held that a private complainant may not be heard by a court except for an "invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed."

If it were conceded that the acquisition of the terminals by the New York Central was in the public interest, I suppose it would not be contended that complainants had any standing to interfere on the ground that their opportunities for obtaining business had been impaired. And, since they are without legal right to intervene to redress a public grievance, the contrary fact that the acquisition will not be in the public interest cannot avail them. Their complaint must stand or fall upon the nature of their own grievance. A private injury for which the law

affords no remedy, cannot be converted into a remediable injury merely because it results from an act of which the public might complain. In other words, the law will afford redress to a litigant only for injuries which invade his own legal rights; and since the injuries here complained of are not of that character and do not result from the violation of any obligation owing to the complainants, it follows that they are without legal standing to sue.

The decision of the Court here proceeds upon the theory that the injury complained of is a denial of equality of treatment in the use of the terminals; but I do not understand this to be the gravamen of the bill. The complaint is of inequality of opportunity to get business—not of opportunity to use the terminals. Complainants' access to the use and enjoyment of the terminal facilities acquired by the New York Central, remains the same in respect of any business they may obtain. Interstate Commerce Act, § 3-(3), (4), as amended by Transportation Act, 1920, c. 91, 41 Stat. 479. The Commission granted the authorization only upon condition that the neutrality of the terminals in their handling of traffic should be preserved.[1] If their use be lessened, therefore, it will not be because access to the terminals has been, or is in danger of being, restricted, but because, with less business, there will be less occasion to use them. An illustration may be helpful: Suppose, instead of these terminal facilities, the acquisition had been of a line of railroad running west from Chicago, which, prior thereto, had been neutral and

[1] Among other conditions is the following:

"2. The present neutrality of handling traffic inbound and outbound by the Junction and River Road organization shall be continued so as to permit equal opportunity for service to and from all trunk lines reaching Junction rails, without discrimination as to routing or movement of traffic which is competitive with the traffic of the Central, and without discrimination against such competitive traffic in the arrangement of schedules."

whose business had been distributed without favor among the several eastern lines terminating at that city. It is manifest that the effect of such an acquisition would be, as it is here, to enable the New York Central to absorb more of the traffic of the railroad so acquired than theretofore and, consequently, to lessen that received by other parallel lines running east from Chicago. In that situation, could any of such lines maintain a suit to annul the authorization of the Commission? It seems to me not; and I can see no difference in principle between the case supposed and that with which we are dealing.

I am authorized to say that MR. JUSTICE MCREYNOLDS and MR. JUSTICE SANFORD concur in this dissent.